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IN THE

Supreme Court of the United States

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October Term, 1951
No. 478

NU-CAR CARRIERS, INC.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Nu-Car Carriers, Inc., respectfully prays that a writ of certiorari issue to review an enforcement order issued out of the United States Court of Appeals for the Third Circuit, entered August 15, 1951 and thereafter vacated and modified September 18, 1951. Petition for rehearing denied September 18, 1951. Said order provides for the enforcement of an order of the National Labor Relations Board against Petitioner.

Opinion Below

The opinion of the Court of Appeals for the Third Circuit filed June 13, 1951 is reported at 189 Fed. 2d 756.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1254 (1).

Questions Presented

1. Is James Leslie Salinger, an Owner-Operator, an Independent Contractor?
2. Is Petitioner guilty of Unfair Labor Practice?
3. Is the order of the Board capable of compliance?

Statement of Fact

This proceeding was initiated by complaint of James Leslie Salinger. The complaint alleged in substance that the Petitioner, engaged in Interstate Commerce in the transportation of automobiles, discharged the said James Leslie Salinger and refuses to reinstate him to his former of substantially equivalent position at the Petitioner's plant. The complaint further alleges that the reason for the so-called discharge and failure to reinstate Saliiger, who it is alleged is an employee, is that he joined or assisted the Union or engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection or for the reason that respondent believed that he had joined or assisted the Union or engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is further alleged that the Petitioner, by its officers, agents, representatives and employees from on or about June 8, 1948 interrogated its employees concerning their Union activities and that Petitioner discriminated in regard to hire, tenure or terms and conditions of employ-

ment, and by reason thereof, Petitioner engaged in unfair labor practice within the meaning of the Act.

The answer of the Petitioner, amongst other things, denies the material allegations of the complaint and in addition to other defenses alleges that Salinger is not an employee within the meaning of the law and the contracts but is an independent contractor.

Petitioner is a common carrier licensed by the Interstate Commerce Commission and is engaged and has been engaged for approximately one (1) year in the hauling of motor vehicles from its plant at Metuchen, New Jersey, to points in and out of the State. It operates under a certificate of convenience of the Interstate Commerce Commission. The method of operation at Metuchen, Raritan, New Jersey, employed by Petitioner was owner-operator plan.

The Petitioner and Salinger entered into two (2) agreements, the substance of one was a purchase and sale of an automobile tractor by the Petitioner to Salinger as owner-operator, pursuant to which Salinger made and paid a down payment of $200.00 and signed a personal note for the balance. Under the second agreement Salinger, as owner-operator, leased the tractor to the Petitioner, which provided for a rental compensation for the lease of the tractor and equipment to be paid on a rate schedule mileage basis and further that Salinger, the owner-operator, was to pay all expenses for the maintenance and operation of his tractor and equipment. He also had the right to hire or fire any help or drivers as he desired and to set the wage scale as he alone saw fit. The lessor (owner-operator) or his duly designated agents or drivers were to operate his vehicle and equipment exclusively for the respondent. Cancellation of the contract of lease could be had by either party giving to the other ten (10) days' notice in writing. In the absence of such cancellation and termination, the agreement shall automatically be renewed for a further period of one (1) year. (Tr. 142 - R 288a - 301a)

Owner Operation

Owner operation has long been recognized by the Interstate Commerce Commission as a means by which certain interstate commerce carriers, holding licenses from the Commission, operate. The Interstate Commerce Commission has proposed rules to govern the practices resulting from agreements, contracts or leases entered into by authorized carriers of property for the purpose of: (1) augmenting their equipment; (2) interchange of equipment, and (3) renting of vehicles or equipment to private carriers or shippers.

Common carriers engaged in the transportation of automotive equipment use either the driveaway method or the truckaway method. The driveaway method involves the movement of traffic in single units under their own power. The truckaway method by which practically all new automobiles are now being moved because, apparently, it is most desirable to the manufacturers, involves the use of specially designed trailers upon which four vehicles ordinarily can be transported. These trailers are not readily adapted to the transportation of other types of freight. The common cariers engaged in this type of business frequently utilize motor vehicle equipment other than that owned by themselves in the transportation of motor vehicles and this equipment is procured through lease arrangements such as in the case at bar or in some instances through interchange with other carriers of motor vehicle traffic. *A very common practice is to lease tractors as here owned and operated by individuals to provide the motive power for the movement of semi-trailers loaded with automobile traffic.* (Italics ours.)

At no time did the Petitioner contemplate employment of persons as employees and at no time did the Petitioner engage anyone to drive a tractor, hauling automobiles as an employer. All were owner-operators (R. 60a).

The Grounds on Which the Decision of the Court of Appeals Rests

1. That the degree of control over the work which the petitioner had the right to exercise under the "sale and lease agreements" is so great as to make the owner-operators clearly employees within the coverage of the Labor Relations Act and not independent contractors (Opinion p. 3).

2. That the rights and obligations of the parties, as set out in the sale and lease agreements, without more, make it clear that Petitioner's owner-operators were not independent contractors even under the strictest common law agency tests (Opinion p. 4). Said rights and obligations as set out by the Court in the Opinion are:

(a) That title is to remain in the company during the term of the lease and the option reserved by the company to purchase the tractor at the "as is" value upon the termination of the agreement for any reason.

(b) That payment on the note may be postponed on request, in the event that the company fails to provide the owner-operator with a gross income of $100 per week.

(c) That the company reserves the right to terminate the agreement if the owner-operator does not operate in harmony with and to the best interests of all persons in the automotive industry with whom the owner-operator has contact.

(d) That the tractor is to be solely under the direction and supervision of the company.

(e) That the operation of all leased vehicles and equipment shall be under exclusive and direct supervision and control of the company.

(f) That the owner-operator must work exclusively and loyally for the company and be subject to call by the company for the rendering of service with equipment at all times.

(g) That the driver's compensation is computed by crediting him with a gross rental of so much per mile varying with the number of cars hauled per load and the length of the trip. From this sum, deductions are made for fuel, repairs, insurance etc. charged to the company and for withholding and social security taxes.

(h) That the company maintained and used a safety patrol car.

(i) That the company issued and enforced a rule that all tractors and trailers be parked in the company lot over-night.

(j) That the company employed a dispatcher.

3. That the *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704 (1947) and *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (6th Cir. 1944) cases, although similar to the case at bar are inapplicable because "In the *Greyvan* case there was no such express reservation of control over the details of the work of hauling furniture, nor the actual exercise of control, as here. In addition the owner-operators there owned their own trucks and all equipment before they came to work for the company, and the work itself required the regular use of helpers who were hired, paid, directed and discharged by the owner-operator. These were the principal factors mentioned by the Supreme Court to accompany its statement that, 'these driver-owners are small businessmen.' 321 U. S. at 719. All are absent in the case at bar. Similarly, although it is perhaps a closer case, in the *Mutual Trucking* case it appears that the owner-operators were actually the owners of their tractors and trailers

before they contracted with the company, retained almost complete dominationover them and they hired, paid and discharged their own drivers."

4. That substantial evidence supported the finding that Petitioner interfered with discussions and possible attempts by the owner-operators to influence the Union not to renew the agreement with the Petitioner, then in effect, and also that Salinger was discharged because of his activities in this regard.

Reasons Relied on For Allowance of Writ

There is no substantial evidence to sustain the finding by the Court below.

1. That the degree of control over the work which the Petitioner had the right to exercise under the sale and lease agreements is so great as to make the owner-operators clearly employees within the coverage of the Labor Relations Act and not independent contractors.

2. That the manner and plan under which the owner-operators worked supported by substantial evidence clearly establishes not alone no control in the direction and supervision of the work but no opportunity by the Petitioner to even exercise such control if Petitioner had such right reserved.

3. That the evidence in the case at bar does not disclose any greater evidence of control over the details in the work or the actual exercise of control than in the *Greyvan* or *Mutual Trucking Co.* cases.

The manner in which Salinger and the other owner-operators performed under the contract is as follows: New cars were on Petitioner's lot, away from the office of Petitioner. The owner-operators loaded cars on trailers without any assistance or help of any of the personnel of Petitioner and made delivery of these cars to designated

points furnished by Petitioner. The tractor and trailer was always under the complete control and dominion of Salinger or any other owner-operator. Once loaded the owner-operator left, and in many instances not to be seen until he returned and wanted another load of cars. There was no direction as to how long the trip should take or what route Salinger or the owner-operator was to choose to such points of destination. Salinger and every other owner-operator had the sole direction and control of the manner in which everything and anything from loading, unloading, driving was to be cared for. In addition Salinger and all other owner-operators assumed complete responsibility for the carriage of the cars from the time they loaded right up to delivery and any damage which would be sustained by reason of improper loading, carriage or improper delivery was that of Salinger and every other owner-operator unless reported before loading. Salinger and every other owner-operator assumed every risk attendant with the operation; he had to pay all operating expense even to the extent if any unforeseen damage occurred; and certainly when Salinger was on the road and he was for numbers of days at a time, it was he who determined what he should do, the manner and means to do it, and when he should do it, without any supervision or control by any of the personnel of the Petitioner. He was not obligated to report to anyone, anytime, anywhere. Salinger could engage a helper or driver to do his work, he had the right so to do if he did not desire to work, he was not obliged so to do. Under these circumstances in what respect has the Petitioner reserved or exercised that degree of control over the details of the work to destroy the independent contractor status?

4. The terms and provisions of the agreements in the case at bar are the usual, ordinary and accepted independent contractor contracts having been recognized by this Court, Circuit Courts, the National Labor Relations

Board and other Governmental Agencies as the only prudent precaution or practical means of assurance to obtain and secure the fulfillment of an independent contractor agreement and necessary in view of the purpose of such agreements.

5. The evidence of the intention of the parties, their conduct, their practices in accordance with the Sale and Lease Agreements irrefutably brings Salinger within the exclusion of the Labor Relations Act, as amended, by the Taft-Hartley Law and makes it impossible to cloak Salinger with an employee status.

(a) Salinger was the owner of a truck and Salinger had a substantial investment and a beneficial interest in such truck.

(b) Salinger did not receive wages. The income of Salinger resulted from his individual effort, capable management, his ingenuity in good business and was the profit remaining after all of the expenditures necessary or incidental were paid by him in connection with his operation.

(c) Salinger was subjected to the risk of loss. The basis for this whole proceeding and the alleged unfair labor practices are alleged discussions had by Salinger with others that the continuation of the lease operation may result in a loss to the owner-operators if the tractors owned by them went bad.

(d) Salinger had exclusive control and dominion over the work to be done by him pursuant to the terms of the contract.

(e) Salinger had the right to work when he willed, he had the right to hire helpers and decide who such helpers may be, and pay such price as he and such helpers agreed to.

(f) Petitioner could not say who such hired helper should be or the price to be paid to him.

(g) Salinger was not an employee because he had no seniority rights; he had no vacations, pensions or holidays.

(h) Salinger had a contract requiring him to do only that which the contract provided and he could not be directed by the Petitioner to engage in any other work.

(i) Salinger could not be discharged at the will of the employer but his contract only be terminated after notice.

(j) The conduct of Salinger prior to the execution of the sale and lease agreement and the negotiations had with respect thereto makes Salinger an independent contractor.

6. The terms and provisions of the agreements in *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704; *U. S.* v. *Mutual Trucking Co.*, 141 Fed. 2d 655; *N. L. R. B.* v. *Steinberg*, 182 Fed. 2d 850; *In the Matter of Nelson Ricks Creamery Company, Inc.*, 89 N. L. R. B., p. 204, are closely similar to the terms in the agreements in the case at bar and in all of the aforesaid cases the independent contractor relationship was held to exist.

7. The decision of the Court below is contrary to the law as enunciated by this Court in *Harrison* v. *Greyvan Lines, Inc., supra;* contrary to and in conflict with

U. S. v. *Mutual Trucking Co., supra;*
N. L. R. B. v. *Steinberg, supra*;
Party Cab Co. v. *U. S. A., supra*;
Magruder v. *Yellow Cab Company*, 141 Fed. 2d 324;

also in conflict with the Board determinations,

In the Matter of Nelson Ricks Creamery Co. Inc., supra;
In re: *J. Howard Smith, Inc.*, 28 N. L. R. B. 1277;
In re: *Spickelmeier*, 24 L. R. R. M. 1103;
In re: *Alaska Salmon Industry*, 81 N. L. R. B. 1335.

In all of which cases the independent contractor relationship was held to have been established on the over-all facts, which are closely identical to the facts in the case at bar.

8. The Court below recognizes the similarity of the case at bar with the *Greyvan* v. *Harrison* and *U. S.* v. *Mutual Trucking Company* cases, but makes the distinction:

> "In the Greyvan case there was no such express reservation of control over the details of the work of hauling furniture, nor the actual exercise of control, as here. In addition the owner-operators there owned their own trucks and all equipment before they came to work for the company, and the work itself required the regular use of helpers who were hired, paid, directed and discharged by the owner-operator. These were the principal factors mentioned by the Supreme Court to accompany its statement that, 'these driver-owners are small businessmen.' 321 U. S. at 719. All are absent in the case at bar. Similarly, although it is perhaps a closer case, in the Mutual Trucking case it appears that the owner-operators were actually the owners of their tractors and trailers before they contracted with the company, retained almost complete dominion over them and they hired, paid and discharged their own drivers."

The law does not demand nor make as a prerequisite to establish the independent contractor status ownership of equipment or the job to be done to require helpers.

Salinger was an owner. Assuming Salinger was not an owner and further that the work to be done did not require helpers, such factors, of themselves, do not change the independent contractor status. Such criteria may help to reach a conclusion on the status but are not themselves the sole criteria, and this, the Court, in the *Greyvan* case did not say nor intend.

See:

U. S. A. v. *Party Cab Co. supra;*
Magruder v. *Yellow Cab Co. supra;*
N. L. R. B. v. *Steinberg, supra;*

also

In the *Matter of Nelson Ricks Creamery Co. supra;*
In re: *J. Howard Smith, supra.*
In re: *Alaska Salmon Industries.*

9. The Court below has disregarded the Congressional Mandate exempting the independent contractor, as set out in H. R. 245, 80 Cong. p. 18, which Congressional Mandate the Courts and the Board have recognized.

N. L. R. B. v. *Steinberg, supra;*
U. S. A. v. *Party Cab Co., supra;*
In re: *J. Howard Smith, Inc.;*
In re: *Kansas City Star Co.*, 76 N. L. R. B. p. 384;
In re: *Nelson Ricks Creamery Co., supra.*

10. The question here involved is a most grave and serious economic one. It is important for this Court to determine whether the differences relied upon by the Court below are decisive.

11. The substantial evidence clearly establishes that any statements allegedly made by Petitioner's representative do not constitute Unfair Labor Practices and that the alleged discharge of Salinger does not constitute an Unfair Labor Practice.

12. The Court overruled in silence the point made by Petitioner that the Petitioner is incapable of complying with the Board Order.

CONCLUSION

Wherefore, Petitioner respectfully prays that this petition should be granted.

NU-CAR CARRIERS, INC.

By JACOB S. SPIRO,
Attorney for Petitioner.

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NU-CAR CARRIERS, INC.,

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NATIONAL LABOR RELATIONS BOARD.

—o—

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals for the Third Circuit filed on June 13th, 1951 is reported at 189 Fed. 2nd 756.

Jurisdiction

The Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Statement of Case

The facts have been set forth in the foregoing petition,

Specification of Errors

It is respectfully submitted that the Court below erred in holding

1) That James Leslie Salinger, the owner operator, is an employee, because
   a) In so doing the Court failed to heed and regard the Congressional mandate and intent as set out in H.R. 245, 80th Cong., p. 18, exempting independent contractors from the Amended Act (Taft-Hartley Law).
   b) In so doing the Court destroyed a bona fide written Lease Agreement in effect between the parties.

c) The Court below erroneously held that the Sale and Lease Agreements reserved to the Petitioner a degree of control to make Salinger an employee.

d) The Court failed to accept the law as enunciated by this Court on the subject of Independent Contractor, or to follow the decisions of other Circuits.

Harrison v. *Greyvan Lines, Inc.*, 331 U. S. 704; *U. S.* v. *Mutual Trucking Co.*, 141 Fed. 2nd 655; *Party Cab Co.* v. *United States of America*, 172 Fed. 2nd 87; *Magruder* v. *Yellow Cab Company*, 141 Fed. 2nd 324; *N.L.R.B.* v. *Steinberg*, 182 Fed. 2nd 850.

d) [1] Board decisions are in conflict with the decision rendered herein.

In re: *J. Howard Smith*, 28 L.R.R.B. 1277, July, 1951.

In the *Matter of Nelson Ricks Creamery Company*, 89 N.L.R.B. p. 204.

In the *Matter of Spickelmeier Co.*, 24 L.R.R.M. 1103.

2) The Court below erred in holding Petitioner guilty of an Unfair Labor Practice because such finding is contrary to the substantial evidence and contrary to law.

a) The evidence clearly established that at the time the Petitioner is charged with an Unfair Labor Practice, the relationship in effect between Petitioner and Salinger was that Salinger was an Independent Contractor.

b) The evidence clearly established that at the time the Petitioner is charged with an Unfair Labor Practice, the intention, conduct and practices of the parties was to establish and maintain the Independent Contract or status.

3) The Court below erred in failing to give any consideration to the impossibility of compliance by Petitioner of the Board's order.

Summary of Argument

POINT I

JAMES LESLIE SALINGER IS AN INDEPENDENT CONTRACTOR.

A.

The Court below disregarded the Congressional intenment of the Amended Act (Taft-Hartley Law, 1947).

B.

The written Lease Agreement between the parties must control.

By the written Lease Agreement, the intention and conduct of the parties James Leslie Salinger is an independent contractor.

C.

The Sale and Lease Agreements did not reserve to the Petitioner that degree of control to make Salinger an employee.

D.

The Decision that James Leslie Salinger is not an independent contractor is contrary to the law as enunciated by this Court, and in conflict with decisions of other Circuits on similar facts.

POINT II

PETITIONER IS NOT GUILTY OF ANY UNFAIR LABOR PRACTICES.

POINT III

THE ORDER OF THE BOARD IS IMPOSSIBLE OF COMPLIANCE.

ARGUMENT

POINT I

James Leslie Salinger is an independent contractor.

A.

The Court below disregarded the Congressional intendment of the Amended Act.

Petitoner respectfully urges examination of the Legislative history leading up to the express exclusion by Congress of "independent contractors" from the Taft-Hartley law. (H. R. 245, 80th Cong. p. 18.) [1]

The law prior to the 1947 amendment was mute as to the "independent contractor" relationship. The amended Act expressly excludes the independent contractor. Although the Act (as amended) does not define such exclusion, Congress has impliedly furnished definitions in explaining the reason for the independent contractor exemption.

Congress felt that the Board (N.L.R.B.) and the Courts had unduly restricted and so narrowed the scope and the meaning of the "independent contractor concept" that it became a matter of absolute necessity by law to expressly exclude independent contractors from the amended Act. The reason for this express exclusion is because Congress wishes to retain the independent contractor status and by this exclusion serves notice on the Board and the Courts so to do.

The House Committee Report clearly indicates this intention and direction and also sets out what it wishes to be the criteria by which an independent contractor relationship is to be determined.

The House Committee stated that the essential criteria is whether or no the disputed individual operates on a profit basis, if his remuneration is in the form of profit rather than wages and if he assumes the responsibility of a job on his

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[1] See footnote page 19.

own rather than under the direction of the company with whom he deals.[1]

Further substantiation of Congressional intendment may readily be found by examining the legislative history leading up to the amendment of the Social Security Law. The President of the United States in his veto message (Public Law 642, 89th Congress) amongst other employments he wished covered, expressly incorporated *"truck drivers"* in his request for coverage, intending thereby

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[1] "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U. S. 111 (1944), 8 Labor Cases 51, 1791), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employee' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. *'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result that is, upon profits.* It is inconceivable that Congress when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'. House Report 245, 80th Cong., p. 18." (Italics ours.)

that the Social Security Law shall be applicable to truck drivers. Congress did not agree and overrode the President's veto and excluded amongst other employments *"truck drivers"* from such benefits, expressly indicating Congressional intent that truck drivers and certain others should not come within the law but that where the common law rules of master and servant still prevails.[2] (Italics ours.)

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[2] In 1948 the 89th Congress by Public Law 642 amended the Social Security Act by inserting the following definition:

> "The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules."

Public Law 642 also provided that the amendment "shall have the same effect as if included in the Social Security Act on August 14, 1935, the date of its enactment."

This amendment was vetoed by the President with the following comment:

> "I return herewith, without my approval, House Joint Resolution 296, to maintain the status quo in respect of certain employment taxes and social security benefits pending by Congress on extended social security coverage.
>
> "Despite representations to the contrary, sections 1 and 2 of this resolution would exclude from the coverage of the old age and survivors insurance and unemployment-insurance systems up to 750,000 employees consisting of a substantial portion of the persons working as commission salesman, *truck drivers,* taxi cab drivers, miners, journeyman tailors, and others. In June, 1947, the Supreme Court held that these employees have been justly and legally entitled to social security protection since the beginning of the program in 1935. I cannot approve legislation which would deprive many hundreds of thousands of employees, as well as their families, of social security benefits when the need for expanding our social insurance system is so great" (Congressional Record, Vol. 94, p. 8268, Advance Part, June 14, 1948. (Italics ours.)

The President's veto was overridden as is shown by the following:

> "THE SPEAKER—The question is, Will the House, on reconsideration, pass the bill, the objections of the President to the contrary notwithstanding?

Two things should be noted:

(a) The Social Security Law was amended in 1948. The Social Security amendment reverts to August 14, 1935.

"MR. GEARHARD—Some time ago the Supreme Court of the United States rendered two decisions in what are known as the Silk and Gray Van cases, which involved the question whether or not certain persons were employees, and therefore covered by social security, or whether they were *independent contractors.*

"In each of these decisions the correct result was reached by the Supreme Court, applying as they should, the ancient common law definition of employment. However, there crept into these decisions a little of what lawyers call obiter dicta; that is some words which were quite unnecessary to the result. These words were to the effect that, for the purposes of social security, the Social Security Administration was not necessarily bound in extending the social security coverage, by the ancient common law definition of master and servant, or employer and employee, as you may choose to call it, but that they would take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.

"The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social security system by bureaucratic ukase. In other words, they would suddenly have found that they had more employers, than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thoroughgoing debate, and by a vote of 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common law defining the relation of master and servant, employer and employe" (Congressional Record, Vol. pp. 8268-8269, Advance part, June 14, 1948.)

"So two thirds having voted in favor thereof, the bill was passed, the objections of the President to the contrary notwithstanding" (Congressional Record, Vol. 94, p. 8271, Advance part, June 14, 1948.)

Congress very obviously wanted to make certain that even past mistakes should be corrected.

(b) The Taft-Hartley Law was adopted in 1947.

The rule of law applicable to Social Security is equally applicable to cases involving the National Labor Relations Board.

The Board has recognized and accepted this Congressional admonition.[3]

The Courts too have accepted the intendment of Congress and the determinations now being rendered are with a realization to carrying out this Congressional mandate.[4]

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[3] In re: *J. Howard Smith, Inc.*, 28 L.R.R.M. 1277, July 1951;

Kansas City Star Co. (February 26, 1948), 76 N. L. R. B. 348 at page 388;

Nelson Ricks Creamery Company, 89 N. L. R. B. 207—note 5.

[4] "Congress regarded the broadening scope of the term 'employee' as contained both in the Social Security Act and the Labor Act, as a usurpation by the courts and the administrative agencies of the Congressional legislative function. There can be no doubt that Congress intended to and did materially limit the term 'employe' as it had been construed and applied by the administrative agencies and the courts. It established in plain and in certain terms that the common law test and that only was to be applied, and again and again in the Committee Reports, it is stated that the common law rules to be invoked must be 'realistically applied.'" *Party Cab Co.* v. *U. S. A.* (C. C. A. 7, Jan. 1949), 172 F. 2d 87, at p. 91. To the same effect see *N. L. R. B.* v. *Steinberg* (C. C. A. 5, June 1950), 182 F. 2d 850 at page 854. "As in the Social Security Act, 42 U. S. C. A. A. Section 31 et seq. and the Fair Labor Standards Act, 29 U. S. C. A. Section 201 et seq. the term 'employee' is not defined in the National Labor Relations Act and the authorities have been at variance in the past as to the 'test' to be applied to determining whether or not an employment relationship exists under this and similar remedial legislative acts. *However, the legislative history of the Taft-Hartley Law, it was adopted in 1947 as an amendment to the National Labor Relations Act, shows quite clearly that when Congress passed the Labor Act it intended the word 'employee' to mean someone who works for another for hire and this clear expression of Congressional intent we are obliged to follow.*" (Italics ours.)

Congress clearly recognizes the economic necessity to retain the small businessman unit in the nation's economy. It has recognized his problems and his economic ramifications and his efforts to exist. This was clearly pointed out by Congressional language in the amendment to the Taft-Hartley Law. It was further recognized in the amendment to the Social Security Law. Thus Congress has exerted every effort by legislation to preserve the independent contractor's existence. In adopting the legislation, Congress pointed this out, and thus warns administrative agencies and the courts to recognize the economic integrity of the small businessman so that he would not be interfered with or his usefulness in any manner impaired by obligations, factors and other problems that are normally placed upon the employer-employee relationship. Obviously Congress, in employing the strong language it did, is fearful that overzealous administrative agencies will by administrative regulations legislate the small independent contractor out of business. This Congress does not want.

In resumé, Petitioner respectfully urges that the Court below by its decision has failed to heed the Congressional mandate or to accept the guide posts submitted by Congress to determine the independent contractor relationship. The Court below in finding the employee status has indulged in the previous narrow and restricted mechanics and once again has committed the very error which Congress by amending the law expressly sought to correct.

Subjecting the facts in the case at bar to the most rigid tests laid down by Congress and by common law, James Leslie Salinger must be held to be an independent contractor.

B.

The written lease agreement between the parties must control.

By the written lease agreement, the intention and conduct of the parties James Leslie Salinger is an independent contractor.

The lease agreement was the arrangement under which Petitioner at Raritan, New Jersey operated.

The contract made between Petitioner and Salinger is the understanding from which the relationship between said parties must be determined.[5]

The existence of a written contract must be accepted by the Court to be one of the decisive "determinative criteria." The day to day truck driver relationship is rarely founded by a formal written contract. The contract between Salinger and Petitioner is not the result of any fraud, evasion, impropriety or improper motive, nor is it ambiguous in any respect. Thus the Court must accept the contract as voluntarily made by the parties with full knowledge and understanding of the contents.[6]

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[5] See *Glenn* v. *Standard Oil Co.* (6th C. C. A. March 1945), 148 F. 2d 51, on p. 53. "The character of the relation is to be determined by the rights and obligations assumed as disclosed in the terms of the written contract as well as in the actual practice of the parties in their dealings with each other."

[6] The courts have accepted a written instrument as an aid in determining whether an independent contractor status exists. In *Cimorelli* v. *N. Y. Central R. Co.*, 148 F. 2d, p. 575, at page 577 the Court states: "Other recognized tests are the *existence of a contract* for the performance by a person of a certain piece or kind of work at a fixed price * * * his obligation to furnish necessary tools * * *." To the same effect see *Chicago Rock Island and Pacific R. Co.* v. *Bond, Administrator of Turner*, 240 U. S. 449. In substance the Court in analyzing the obligations existing between the parties found that the same were contained in formal contract and that the status of the independent contractor relationship stemed and existed from a written contract. Also in *Grief* v. *Industrial*, 93P2 961 (pages 962 and 963), the Court in substance stated that "an agreement in advance regarding price * * * is a strong indication of the independent contractor relationship." (Italics ours.)

It is not the province of the Court to make a new agreement for the parties.[7]

In determining that Salinger was an employee the Court below disregarded an enforcible agreement. Even a poorly or defectively drawn instrument should not be destroyed and superseded by a new agreement. By holding Salinger an employee, the Court below has imposed upon Petitioner a new arrangement, attendant with new responsibilities not contemplated by the Petitioner. This is error.[8]

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[7] See *American* v. *Willis*, 170 F. 2d 215 (Oct. 1948, C. C. A. 5), p. 217 "We are not permitted to make contracts for litigants but only empowered to construe the language and meaning of contracts made and entered into, as they are intended and understood by the parties." (Cases cited.) In *Shell Oil Co.* v. *Manley* (C.C. A. (7) 124 F. 2d 714, p. 715 "Courts are not authorized to make contracts for the parties, but must construe them as written and where plain common words are used in their ordinary meaning they must be accepted in that sense." In *Tahir Erk* v. *Glenn L. Martin*, 143 F. 2d 232 (C. C. A. 4, June 1944), p. 234, "The contract as made by the parties must be enforced by the courts, and the courts have no power to change or modify the contract or to make a new contract for the parties (citing cases). The rights of the parties to a contract must be determined by the terms of the agreement that they have voluntarily made. Courts cannot make a different contract for them or relieve them of the consequences of a bad bargain."

In *City of Philadelphia* v. *Lieberman* (Feb. 1940, C. C. A. 3), 112 F. 2d 424, on page 429 certiorari denied) "We cannot rewrite the agreement of the parties but must take it as they have written it."

In *D. H. Pritchard* v. *Nelson*, 147 F. 2d 939 (C. C. A. 4, Feb. 1945), p. 942, "While it is sound law that the courts have no right to make contracts different from those actually entered into by the parties (citing cases), it is equally true that we may not disregard the obvious intentions of the parties. Nebulous as these intentions sometimes appear, it is our duty to place ourselves as nearly as may be, in the situation of the parties at the time of the execution of the contract" (cases cited).

[8] In *N. L. R. B.* v. *Steinberg, supra*, the Court on page 854 discusses this particular phase: "The contracts here purport to be subleases and the agreements being susceptible of that construction, the court should be slow to assign any other term to the relationship resulting from the contracts, unless it clearly appears that this relationship must be rejected in favor of definitions and concepts expressed or implied in the Federal Statute itself."

The owner operators did not agree to enter into the service of the Petitioner and do whatever Petitioner requested or called upon them to do, but owner operators contracted for a specific piece of work. The-owner operators could not be called upon by the terms of their agreement of lease to engage in any work other than the provisions of the contract demanded, *Casement* v. *Brown,* 148 U. S. 615.

The intention of the parties must control. This is true even where agreements may not be too clear. Petitioner never intended an employer-employee relationship. The language of the owner-operator union contract leads to the irrefutable conclusion that only the status of independent contractor was intended under said contract. "If the lease arrangement is not considered satisfactory by the Union then the parties hereto agree to negotiate a *wage contract* which does not have a reference to an owner-operator and lease agreement." (Italics ours.)

The Circuit Court by its decision has created a new contract for the parties. It is respectfully submitted that a Court is without power either to make, change or modify contracts or to impose new covenants and obligations not contemplated either by the parties or in any manner contained within the formal writing. The law cannot create contractual obligations which were not based on the express intention of the parties (*American* v. *Willis, supra; City of Philadelphia* v. *Lieberman, supra*); nor should the Court seek the reason for an agreement or impugn the motive of any contracting party.

The Lease Agreement is clear on its face, it is unambiguous and should be accepted as the relationship between the parties. It is the function of the Court to enforce a contract voluntarily and legally made.[9]

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[9] In *Magruder* v. *Yellow Cab Company,* 141 F. 2d, 324 at p. 325:

"The contract which forms the basis here for the relationship between Yellow Cab and the drivers is quite clear and utterly lacking in ambiguity. This contract is in form a lease,

The mere fact that a promise or condition is somewhat harsh or unfair in its operation does not excuse performance.[10]

Petitioner further respectfully submits that the acts of the parties to the contract is the best test and the clearest expression of the intention of the parties for construing he contract and must be resorted to by the Court.[11]

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it is called a lease, it contains the provisions normally found in a lease. The drivers acquire from Yellow Cab the possession and beneficial use of the taxicabs; Yellow Cab receives from the drivers a stipulated sum of money as rent paid for such use. We see in this contract the hired use of a thing, a classical bailment known as *locatio rei*, only that and nothing more". And there is nothing here to indicate that this contract is a sham to cloak real relationship. This form of contract was prompted by economic necessity, etc."

[10] In *Northern Pac. Ry. Co.* v. *U. S.*, 70 F. Supp. 836, p. 862. The law does not protect against conditions, harsh though they may be, which a party to a contract voluntarily imposed on himself (citing cases). It is not the function of the courts to make a new contract for the parties. See also *Central* v. *Jim Dandy Markets*, 77 F. Supp. 171, p. 175.

In *Nelson Ricks Creamery Co., supra.*

[11] *Kennedy* v. *Silas*, 68 F. Supp. 576, p. 580; *Smyth* v. *Board of Commerce, etc.*, 87 F. Supp. 138, p. 143. The practical interpretation given to their agreement by the parties to it, while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of their true intent, and courts that follow it will rarely go far astray. To the same effect see *Flynn* v. *Bendix*, 77 F. Supp. 452, in which the Court stated substantially that the interpretation given by parties, as shown by their acts, is of substantial probative value. The record clearly and without any doubt discloses that Salinger left his previous employer, Anchor Motor as an employee and that he came to the Petitioner to try this new arrangement in which he was to be his own "boss" and that he was leaving behind him an employer and that with the Petitioner he was not to be an employee.

In *Bartels* v. *Birmingham*, 59 Fed. Supp. 84 on page 88, the Court states that the contract should be appraised in connection with the circumstances that both preceded and followed its execution. Citing *Burtler Bros.* v. *N. L. R. B.* (C. C. A. 7), 134 F. 2d 981, page 985.

The record is replete with prima facie testimony that the parties unequivocally conducted themselves in the status of an independent contractor relationship,[12] that the arrangements were satisfactory,[13] that the parties had knowledge of their relationship,[14] and that the plan was understood and liked.[15]

The importance of the intent of both parties to consider the relationship as one of independent contractor was specifically mentioned in *Spickelmeier Company,* 83 N.L.R.B. 452, where the Board held at page 547:

> "(10) testimony of both the employer and the drivers themselves indicates that both parties consider the relationship as one of employer-independent contractor rather than employer-employee".

The owner-operators by their own language, intentions and actions, recognized this situation. Salinger and the others knew and intended to operate as independent contractors and not as employees for at least a four month period, under the contract arrangements (R. 68a-70a, 82a). They in their own minds knew this arrangement was something entirely other than employer-employee. It was independent owner-operator. That is why these owner-operators drew the vital distinction that if they did not feel that they were earning sufficient money, that after a four month period, they would consider amongst themselves the desirability of terminating their owner-operator arrangement and go company-owned and perhaps become employees (R. 100a-103a, 145a). This disclosed intention of going company-owned and perhaps becoming employees demonstrates the awareness on the part of the owner-operators that they would be changing from an independent contractor relationship into a different one.

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[12] R. 21a (15), 23a (10), 25a (22), 26a (23), 27a (24), 28a (27).

[13] R. 82a (125), 168a (441).

[14] R. 80a (122), 103a (155), 117a (241), 128a (295-296), 129a (297), 198a (527), 186a (476), 202a (538).

[15] R. 145a (330), 146a (331).

The owner-operators knew that as owner-operators they were considered by the union as being in a different category from other members (R. 303a-304a). Their membership books were stamped "Truck Owner" and they were not permitted to vote or even attend meetings (R. 373a-375a).

The agreements between the parties is silent as to hours of employment, wages, seniority rights, pensions, vacations, sick-leave or overtime, nor is there any testimony respecting any of the above. These advantages that ordinarily accrue to the employee are lacking; yet the lease agreement expresses the advantages of the independent contractor relationship.

It is not possible to conceive that with the economic structure as it is, when labor is so well informed of its rights and privileges, when through the media of labor publications, the press, the radio and otherwise so much has been said and advocated that employees as such must have definite wages, that all union contracts where the relationship is that of employer and employee provide for seniority rights, pensions, vacations, sick leave, overtime pay and other employee benefits, that here, where not one of the foregoing benefits is even remotely mentioned, not alone provided for, that the relationship is that of employer-employee. It is the most strained attempt to foist on Petitioner a relationship which it never contemplated, desired or wanted. Is it reasonable to assume that these owner-operators and there were some 28 would have been satisfied to work as employees without the usual normal employee benefits accruing to them? Or is it not more logical and reasonable to conclude Petitioner and the owner-operators never intended an employer-employee relationship, nor did the owner-operators want to be employees. They wanted to be in business for themselves. And the strongest proof of this fact is that if Salinger did not want to go into business

for himself he would have remained with Anchor Motor Freight were he had come from and where he had valuable seniority rights (R. 70a).

Lease agreements such as here are not unique or unusual. They are exceedingly common, accepted and recognized in the trucking industry and by the government.[16]

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[16] On June 5, 1947, the Interstate Commerce Commission issued a memornadum to its staff on the subject of leasing. At page 20 of said report the writer says:

> "The owner-operator had acquired a place in the motor carrier industry prior to the period of regulation. He is engaged in furnishing a service for which there is a demand in the motor-carrier industry. The business offers certain attractions over those of carrier-*employment. The owner-operator is in the business because he likes being his own 'boss'. During the years prior to enactment of the Motor Carrier Act, 1935, widespread unemployment and available second hand vehicles which could be purchased on the installment basis, combined to increase the number of such operators. At the present time, the interest of veterans in embarking upon a business of their own, the assistance available to them in the purchase of equipment, and the difficulties afforded established carriers, account for the increase in this activity.*" (Italics ours.)

Also this comment in Business Week.

The term owner-operator, which is of relative recent origin (Business Week, July 23, 1949, p. 56), describes a variety of relationships in the trucking industry. It may denote a person *who owns and drives a single truck for a carrier.* Again, it may apply to an individual who owns numerous trucks and has a staff of drivers. In this latter type of operation the owner-operator may not personally operate a vehicle but may merely furnish the carrier with vehicles and drivers. *An owner-operator may serve a single carrier exclusively for a period of years, or he may merely lease his services and equipment for a single trip.* At times the owner-operator may work for a number of carriers when his "regular" carrier is unable to provide him with enough traffic. Interstate Commerce Commission, Bureau of Motor Carriers, A Preliminary Statistical Report on the Leasing of Owner Operator Equipment, Washington, D. C., May 1943, pp. 4-6. (Italics ours.)

Lease contracts identical in the main with the one here have already been approved by the Court.

The most important case on the subject of independent contractors is the case of *Harrison* v. *Greyvan Lines Inc.* (*Harrison* v. *Silk*), *supra.*

The case is especially important not only because it is the leading case but also because the facts are virtually the same as in our case.

Action was brought in that case to recover sums exacted by the Commissioner of Internal Revenue as Employment taxes on employers under the Social Security Act. The question was whether the workers involved were employees or independent contractors under the act. The Company operated a trucking business under a permit issued by the Interstate Commerce Commission. The Court in its decision says on page 708-709:

> "The system was based on contracts with the truckmen under which 1. the truckmen were *required to haul exclusively for the Respondent* and 2. to *furnish their own trucks and all equipment and labor* necessary to pick up, handle and deliver shipments. 3. to *pay all expenses of operation* 4. *to furnish all fire, theft and collision insurance which the Respondent might specify* 5. *to pay for all loss or damage to shipments* and to indemnify the company for any loss caused by it by the acts of the truckmen, their servants and employees 6. *to paint the designation "Greyvan Lines" on their trucks,* 7. to collect all money due the company from shippers or consignees and to turn in such monies at the office to which they report after delivering a shipment 8. to post bonds with the company in the amount of $1,000.00 and cash deposits of $250.00 pending final settlement of accounts 9. *to personally drive their trucks at all times or be present on the truck when a competent relief driver was driving* (except in emergencies when a substitute might be employed *with the approval of the company*) and 10. *to follow all rules, regulations and instructions of the company.* 11. All contracts or bills of lading for the shipment of goods were to be between the Respondent and the Shipper, 12. *the company's instructions covered directions to*

the truckmen as to where and when to load freight. 13. If freight was tendered to truckmen they were under obligation to notify the company so that it could complete the contract for shipment in its own name. 14. As remuneration the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52 percent and a bonus up to 3% for satisfactory performance of the service. 15. *The contract was terminable at any time by either party.* 16. *These truckmen were required to take a short course of instruction* in the company's methods of doing business before carrying out their contractual obligations to haul. 17. *The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions.* 18. Cargo insurance was carried by the company. 19. *All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the Company as a motor carrier under any Federal or State Law" were to be obtained at the Company's expense.*

The record shows the following additional undisputed facts, not contained in the findings. 20. *A manual of instructions, given by the Respondent to the truckmen,* and 21. *a contract between the company and local No. 711 of the International Brotherhood of Teamsters, Chauffeurs Stablemen and Helpers of America were introduced in evidence.* It suffices to say that the *Manual purported to regulate in detail the conduct of the truckmen in the performance of their duties and that the agreement with the union provided that any truckmen must first be a member of the union,* and that grievances would be referred to representatives of the Company and the Union. A company official testified that the Manual was impractical and that no attempt was made to enforce it. We understand the union contract was in effect. 22. The company had some trucks driven by truckmen who were admittedly company employees. Operation by the company under the two syssemt were carried out in the same manner. 23. *The*

> *insurance required by the company was carried under a blanket company policy* for which the truckmen were charged proportionately." (Numerals and italics ours.)

Petitioner has quoted the above in full to indicate that the elements of the relationship between Greyvan's truckmen and the Company are almost identical with the relationship that pertains in our instant case.

On page 718 the Court goes on to say:

> "There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management, as here, they must be held to be independent contractors. These driver-owners are small business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

It is important to note that the Court's decision holding the owner-operators to be independent contractors was rendered prior to the amended act of 1947. Furthermore, the opinion of the Court was rendered under the then ruling law of the *Hearst* case (*National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111) which laid down the broad definition of "employees" under the old act. But despite this, this Court held that the contracts of the owner operators established an independent contractor relationship.

The case of *United States* v. *Mutual Trucking Co.* (C. A. 6, 141 F. 2nd 655) is in point. The Court on page 657 sets forth the elements involved in that case as follows:

> "1. The owners-operators haul exclusively for the Appellee, ordinarily using their own equipment which consists of a tractor and trailer and being 2. paid a flat rate for each trip according to a printed schedule of which all owner-operators have notice in advance of the trip. 3. The operation consists of the transfer of sealed and loaded trailers between the terminals of the 'Universal Car Loading and Distributing Company, in Chicago, Milwaukee, Toledo and other important cities. 4. Each owner-operator hires and discharges his drivers. 5. The payment of the drivers, the cost of maintenance and repairs and the cost of operation are borne exclusively by the owner-operators. 6. In compliance with the contract individual insurance covering both property and tort liability is carried by the owner-operator. 7. The equipment is marked usually 'OPERATED FOR MUTUAL TRUCKING COMPANY', but a number of trailers are marked only with the name of the owner-operator. 8. The trucks carry plates secured from the INTERSTATE COMMERCE COMMISSION which are required by the rules of the Commission and are applied for by the Appellee, but each owner-operator secures his own State License plates and driver's licenses * * *. 9. All drivers of trucks are required to register at stations maintained by Appellee, on the principal routes for the purpose of checking the time of the trip. 10. No penalty is exacted by Appellee if the shipment is delayed, but the Appellee, in order to assist in prompt disposition of freight, requires that the drivers file a so called 'daily-log' which indicates the number of driving hours and helps the Appellee to know how far at a given time the load has progressed. 11. The Appellee has established a road control consisting of certain inspectors who drive on the route in order to check on the

observance by the truck drivers of statutes and regulations of the various Commissions" (numbers ours).

The Court held that the drivers were independent contractors.

In July, 1951, in re: *J. Howard Smith, supra,* the Board found the independent contractor relationship to have been established on these facts. Atlantic Navigation Company is a wholly-owned subsidiary of J. Howard Smith, Inc. and the owner of fishing vessels used by captains engaged in fishing. The relationship of the ship captains is governed by two dependent and related agreements. Under the charter with Atlantic a captain takes full and exclusive possession, management, navigation, control and operation of a vessel worth from $150,000 to $300,000. The boat is completely equipped by Atlantic which also furnishes the fuel for normal daily operations. In return the captain pays Atlantic $4.40 for each thousand fish caught and sold. The captain also signs an agreement with Smith. By this agreement, the captain agrees to sell and Smith agrees to buy all Menhaden fish delivered by the Captain to Smith during the season at a certain price per thousand. The term of the agreement with Atlantic is for the fishing season although Atlantic may terminate on two days' notice if the captain fails to keep the conditions of the charter.

Agreements such as used by Petitioner are common. These agreements may vary as to form and possibly content depending on the industry involved. The agreements do not vary in intent.

The terms of the Lease Agreement coupled with the intention of the parties as the same may be gathered from the conduct of the owner-operator operating under the agreements clearly establishes Salinger to be an independent contractor.

C.

The sale and lease agreements did not reserve to the Petitioner that degree of control to make Salinger an employee.

On page 4 of the Opinion the Court states: (R423) "That the rights and obligations of the parties are set out in the sale and lease agreements in detail." And further that "The Respondent's drivers were not independent contractors even under the strictest common law agency tests."

A careful analysis of the provisions relied upon by the Court below will indicate to this Court that the inferences which the Court below has drawn to spell out the right of control in Petitioner are not supported by substantial evidence and are contrary to law.[17]

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[17] This Court has indicated that if the reviewing court cannot find the evidence supporting the Board's decision, substantial when viewed in the light furnished by the entire record including the body of evidence opposed to the Board's view, it is not barred from setting aside the Board's decision.

In *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474 (decided Feb. 26, 1951), the Court on page 490 says:

> "We conclude therefore that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Court below concedes and finds as facts that provisions of the lease agreement support Salinger to be an independent contractor (Court's Opinion p. 4). (R 428)

> "There is no provision requiring the driver to be on the job so many days a week and so many hours a day" etc.

The Court recognizes that this important criterion—complete freedom to work is wholly inconsistent with an employer-employee relationship, but seeks to nullify its significance by saying "but in the very nature of the work this is not to be expected."

The nature of the work is not the test. A test may be whether the owner-operator was to be on the job every day.

We take it the Court below here means that the owner-operators in fulfillment of the lease contract were on the road for periods of time. This does not create or negate the independent contract or relationship.[18]

Further seeking to nullify the important criterion of the independent contractor relationship that there is no provision in the Lease Agreement requiring the owner-operator to be on the job so many days a week and so many hours a day, the Court says (Opinion, p. 4): (R 428)

> "Regularity and availability are guaranteed by the provisions that the driver must work exclusively and loyally for the Company and be subject to call by Company for the rendering of service with equipment at all times."

Sole and exclusive provisions in independent contractor agreements have been passed upon by the Courts with ap-

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[18] "The truckmen were not employees of taxpayer but were independent contractors; they travelled long distances from its place of business and were on the road for long periods of time and it was therefore impracticable and impossible for taxpayer to exercise control over the means and manner of the transportation, loading and unloading of the goods."

Greyvan v. *Harrison,* 156 F. 2d, p. 414.

proval and have been held not to destroy such relationships.[19]

The provision to work exclusively and loyally should not be given an unnatural interpretation. This provision must be given the meaning intended. The meaning and intent is simple. During such time as Salinger is actually performing his work under the contract he is to work exclusively and loyally for Petitioner. What other meaning can this provision have? The very language of the contract permits Salinger the freedom of working at all or anywhere. The express right to hire others to work for

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[19] In *N.L.R.B.* v. *Steinberg, supra,* at page 856, the Court giving express consideration to the very subject, says:

> "Turning now to the specific provisions of the agreement upon which the Board relies to evidence an employment relationship, the Board found that respondents enjoyed 'absolute and exclusive control over the trappers' time during the season'. This finding is based on an interpretation of certain provisions in the subleases under the terms of which the lessee 'agrees to trap' the premises, to devote 'his best efforts and skill' to this pursuit, to 'not leave the leased premises' * * *," without the consent of the lessor, "and to 'devote his entire time to the said purpose'. Of course it is necessary, not only as a practical matter but also as a matter of law, to impose upon the trapper an obligation to trap the lands. Furthermore, a requirement that a party to a bargain devote his entire time to the doing of a specific job, for a limited period of time, without retention or exercise of the right to say how the job shall be done, is entirely consistent with an independent contractor relationship and has no tendency to indicate an employment relationship. As for the requirement that the trapper will not leave the premises, this provision is to be expected because of the circumstances peculiar to this industry * * * We find nothing determinative in these provisions of the agreement and the courts have repeatedly held that an employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee."

him negates any other interpretation but that during the time he is actually fulfilling his agreement he must work loyally and exclusively. This the Petitioner is entitled to.

In re: *Greyvan* v. *Harrison, supra,* the contract provided for the exclusive services of the truckmen and their equipment including their motor vehicles and all necessary paraphernalia and materials for the business in connection with this exclusive service.

This point was specifically set forth as one of the important features of the owner-operator agreements that "if the truckman did any hauling for any one other than the company, his contract would be subject to termination for breach." After considering the aforementioned, the Court upheld the District Court finding, which held that:

> "The truckmen were not employees of taxpayer but were independent contractors; they travelled long distances from its place of business and were on the road for long periods of time and it was therefore impracticable and impossible for taxpayer to exercise control over the means and manner of the transportation, loading and unloading of the goods."

In the *Mutual Trucking Company Case, supra,* the contract also provided that the owner-operators were to haul exclusively for the company.

It may well be that the obligation of an owner-operator to work exclusively for another guarantees regularity and availability but only to the extent of fulfillment of the terms of the contract for its duration. In contradistinction in employee status there is no guaranteed period of employment and no contractual obligations to fulfill.

By the language that the tractor is to be used solely "under the direction and supervision of the company and that the operation of all leased vehicles and equipment shall be under exclusive and direct supervision and control of the company", the Court below comments (Opinion p. 4) R428 the company reserved the right to control the manner and means of driving these tractor trailers and loading and

unloading them. The fact is that no such conclusion may be made from the evidence in the case.

The owner-operator and only they or their designated agents drove any tractor. There is not one single word in the record that at any time did any of Petitioner's personnel drive an owner-operator tractor.

Further, the Petitioner could not have reserved the right to control the manner or means of driving the owner-operator tractors because reservation of manner or means of driving presupposes direction and supervision. This was impossible. The owner-operators were on trips far away from Petitioner's terminal or personnel. (See *Greyvan* v. *Harrison, supra.*)

Loading and unloading were done by the owner-operators without any direction or supervision and away from Petitioner's terminal.

Salinger and all other owner-operators were their own "bosses".

There is nothing in the agreements between the parties or in their practices that indicate the hour that the owner-operators had to report to the Petitioner's terminal or for that matter the day. Owner-operators could come or go as they pleased (R. 117a)—their time was their own. No objection was ever made nor could Petitioner object or was any owner-operator ever stopped from spending his time in talking nor was any owner-operator hindered or molested in any way from doing so while on the Company's premises (R. 372a-373a).

How different from the control exercised over employees. For instance, J. Romancheck, a repairman employed in the Petitioner's garage testified that he had to punch a time clock. And when he attempted to discuss matters with the owner-operators he was told by his superior not to discuss union matters on company time (R. 162a).

Employees who drive trucks for the Petitioner at other terminals (none were employed at this terminal) were told what days they must work, what time to report, what time

to depart, when they were to arrive at the dealer and at what speeds to operate (R. 218a-219a). In some instances governors were put on the tractors to regulate the speed at which they could be driven by employee drivers. None were ever put on tractors of owner-operators (R. 378a-379a).

On page 6 of the opinion, the Court again concedes and finds evidence to support Salinger as an independent contractor.

> "On the other hand, the Company did not as a general rule prescribe the routes which the drivers were to take."

And again the Court seeks to nullify the effect of this important criterion by adding:

> "However, it did employ a dispatcher and there was testimony of at least one instance in which this dispatcher routed a driver."

In the *Greyvan Case, supra,* the company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions.

In the *Mutual Trucking Company Case, supra,* at p. 658, the drivers are required to register at stations maintained by the company and the Mutual Trucking Company had established a road patrol of inspectors who drive on the routes in order to check on the observance by drivers of the regulations of the various commissions.[20]

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[20] In *Mutual Trucking Co., supra*:

"The Government contends that the findings of the District Court are supported by no evidence, claiming that the operation through dispatchers and highway inspectors employed by appellee and the requirements of driver's reports, all are evidence of such control as to necessitate a finding that the employer-employee relationship exists."

After summarily discharging without merit any contention that control may be implied from road inspection or even from the fact that the road patrol, instead of reporting any violation of the law or

With reference to the fact that the tractors in our case were operated under a certificate of convenience of the Interstate Commerce Commission issued to the Company, the Court in the same case on page 658 says on this very point: [21]

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regulation to the appellee, could report it to the police, went on to say at page 659:

> "Neither the drivers nor the owner-operators are under appellee's control with reference to the manner of their work, *the important regulations which they observe grow out and are imposed by the contract and the applicable statutes and regulations.*" (Italics ours.)

[21] "The Government contends that the findings of the District Court are supported by no evidence, claiming that the operation through dispatchers and highway inspectors employed by Appellee and the requirements of driver's reports, all are evidence of such control as to necessitate a finding that the employer-employee relationship exists. It stresses the circumstance that in order to secure the license plates, which, under the rules of the Interstate Commerce Commission, were required to be attached to trucks in operation, the president of the appellee company was compelled to make application to the Interstate Commerce Commission and expressly to state that such plates were to be displayed on motor vehicles operated by and under the control, supervision and responsibility of the appellee. We do not consider this fact conclusive. The Interstate Commerce Commission recognizes operation of trucking companies through independent contract, and in its auditing department reports this class of business under the heading 'Purchased Transportation'. Since the Motor Carrier Act, now part II of the Interstate Commerce Act, Title 49, U. S. C. Section 301 et seq.; 49 U. S. C. A. Section 301 et seq. covers 'all vehicles operated, by, for, or in the interest of any motor carrier, irrespective of ownership or of contract, express or implied', Title 49 U. S. C. Section 303 (19), 49 U. S. C. A. Section 303 (19) the present operation, so far from being condemned, is valid under federal law.

The Court clearly recognized that although there is a divided responsibility between the owner-operators and the Mutual Trucking Co., nevertheless, a true and independent contractor relationship did exist and at page 659, the Court says:

> "While both the appellee and the owner-operators have an interest in the transportation, and the responsibility is divided between them, clearly there is not such control as to create the relationship of employment between the appellee and the owner-operator or drivers."

In the *Nelson Ricks Creamery Co.* case, *supra,* the drivers who testified referred to the Employer's field man as their "boss." Yet this was not held by the Board to vest in the company that degree of control to make the drivers employees.

Another concession and finding of fact of an important criterion to support the independent contractor status (p. 6 opinion): (R V 3 c)

> "The contract permitted the owner-operator to designate others to drive in his stead."

Here too there is the strained effort to minimize the concession by the following statement:

> "There was evidence of only one instance in which this was done and on that occasion the Company's permission was sought and received." (R V 3 c)

Under paragraph III of the Leasing Agreement (R. 289a) the owner-operator could himself drive the tractor, or designate any persons he so desired as agents or drivers to operate the same, day or night. Evidence at the hearing indicated that owner-operators not only had the right to hire their help but did so in fact. The owner-operator had complete control of what helpers he wanted to make use of, whom to hire and what to pay them (R. 243a). The fact

that there may have been only one instance in which an owner-operator exercised the right reserved in the contract and even he received permission does not make less the right of the owner-operator to designate an agent, or a driver. Such a right whether exercised or not should be sufficiently convincing that the owner-operator was an independent contractor.

In the *Greyvan* case, the provision of the contract stated that the owner-operator was to personally drive his truck, except that he was permitted to use a competent helper as a relief driver and in cases of unforeseen circumstances he might, upon notifying the Company and obtaining its approval, employ a substitute, but he or the approved substitute was required to remain on the truck. Severe as this provision may be, it did not destroy the independent contractor relationship.

In the *Nelson Ricks Creamery Company case, supra,* the drivers were not bound personally to perform the contract and may have assistants and replacements, and there is no instance of the employment of others to perform the work of the driver. The Board did not by reason of this situation find that the driver is an employee.

In *N.L.R.B.* v. *Steinberg, supra,* the trappers had no right to hire anyone to work for them. All the work had to be done by them. The trappers could not leave the premises. The point is just this: Whether or not in our case an owner-operator completed the agreement himself or engaged others to do it is immaterial—the owner-operator had the right so to do. That very incident—the right so to do—whether exercised or not—may be the criterion—and by such criterion—Salinger must be judged to be an independent contractor.

Again on p. 5 of the Court's Opinion, the lower Court once more indulges in conceding that an important criterion to establish the independent contractor status exists be-

tween Salinger and the Petitioner. The method of compensation is discoursed upon and the Court finds, as it must as a matter of fact, that Salinger's income is not pursuant to any definite mode or adopted manner of compensation customarily employed and used when the employer-employee relationship exists. That Salinger's income actually rests upon factors alien to an employee wage or pay.

Opinion p. 5: (R429)

> "Turn now to the method of compensation under these agreements. The driver's compensation is computed by crediting him with a gross 'rental' of so much per mile varying with the number of cars hauled per load and the length of the trip. From this sum deductions are made for fuel, repairs, insurance, etc., charged to the company, and for withholding and social security taxes. The company guarantees minimum net earnings of 11 cents per loaded mile. All fuel and maintenance is to be obtained at the company garage except for 'road' purchases, which were to be charged to the company at specified stations.
>
> It is not apparent how this method of compensation shows the drivers to be independent contractors. What little inference of right to control in the driver that arises from such a method of compensation, as opposed to a straight hourly wage rate, is overshadowed by the express contract elaborately providing for company control."

The Court has given to Salinger one of the most vital attributes and characteristics of the independent contractor status. That is to say, that Salinger's compensation could only be found within the contractual understandings and thereafter decreased or impaired by his obligations to bear the cost in carrying it out. The Court goes on to state that there is some inference of control arising in Salinger from that mode of payment. It is respectfully

submitted that that characterization is not only incomplete but rather an effort to minimize the importance of that particular element that the Courts have always looked to, to determine whether an employee or independent contractor status exists; but then the Court destroys its finding of this vital criterion clothing Salinger with an independent contractor status and with it some inference of right of control within Salinger by stating that such a mode of payment, which is diametrically opposed to a straight hourly wage, that is to say, the customary mode of compensation to an employee, is over-shadowed by the express contract elaborately providing for company control.

The income of Salinger resulted from his own efforts, ingenuity, able management and productivity and what remained to him after all expenses and carrying charges was his profit. Salinger had the element of risk of loss which likewise, under the circumstances, would subject him to decrease in profit if his losses were high.

> *Harrison* v. *Greyvan, supra; U. S.* v. *Mutual Trucking Company, supra; In re Nelson Ricks Creamery Co., supra.*

Substantially the same method of compensation was used in the *Greyvan* and *Mutual Trucking Co.* cases.

In the *Greyvan* case the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52 per cent and a bonus of up to 3% for satisfactory performance of the service.

In the *Mutual Trucking* case the truckmen were paid a flat rate for each trip according to a printed schedule of which all owner-operators have notice in advance of the trip.

In the *Nelson Ricks Creamery Co.* the rate of compensation was based upon the amount of milk hauled.

The fact that social security taxes and unemployment insurance were paid by the Petitioner is not controlling.[22]

The Court below employs the words "straight hourly wage rate". (R429)

The term wages in any form always presupposes the payment of a definite sum of money for work done on a hourly, weekly, or monthly basis to an employee. The employee has a right to ask for more money, hourly, weekly or otherwise.[23] If it is wages, the employer is paying, the employer may require an employee to do any work necessary. The employer is not bound by a contract express in its terms respecting what is to be done.

In the brief p. 30 submitted by the Board before the Circuit Court, discussing the method of compensation, it would appear that the Board would concede that the manner in which Salinger was paid warrants the conclusion that Salinger was an independent contractor.

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[22] This specific point was raised in *Matter of Southwestern Associated Telephone Co.*, 76 N. L. R. B. 1105, at p. 1113, and the Board dismissed this contention stating:

> "In reaching the conclusion that the agents are independent contractors, we have not overlooked the fact that the corporation make payments on workmen's compensation and social security coverages for the agents and the operators under the agents. This factor is not in itself decisive, since such payments by the corporation may be regarded, for example, as a form of business insurance designed to protect their business interests."

[23] See *Labor Board* v. *Jones & Laughlin*, 331 U. S. 416-429:

> "Wages, hours, benefits and various other conditions of work normally remain subject to determination by the private employees."

And on page 425:

> "When the employee retains unfetted power to fix wages, hours or other working conditions."

The Brief states:

> "Conceivably, if the drivers had some freedom of action respecting the maintenance, fueling and repair of the trucks, some weight, although not controlling, could be accorded this method of compensation on the theory that some entrepreneurial judgment entered into the driver's selection of fuels, repairmen, etc."

The driver did have freedom of action. There was no restriction with respect to the purchase of gas (R. 375-376). Irrespective of this, how does this spell out control?

In the *Party Cab* case, *supra,* the government took the position that it did not believe that such distinctions as to whether the driver is required to buy gasoline from the owning company or to telephone to the central office etc. affects the fundamental nature of the working arrangement.

In the *Magruder* v. *Yellow Cab* case, *supra,* the independent contractors purchased their gas from the Cab Company, and the fact that they were obliged so to do, did not create that kind of control to make the taxi drivers employees.

The requirement is a common one in arrangements of this sort and have been held by the Court not to affect the independent contractor relationship. In the *Greyvan* case, the owner-operators were required to patronize certain designated parking lots and purchase as much gas as possible from such lots. See also *Mutual Trucking Co., supra; Commercial Motor Freight* v. *Ebright,* 143 Ohio St. 127, 54 N. E. 2d, 297.

The purchase of gas provision of the contract (paragraph VIII of the Lease Agreement, Pet. Exh. 1, 292a), is a mutual one and favors the owner-operator especially so when we accept past experience when gas, oil, tires, etc. were unavailable.

With respect to repairs, paragraph VIII of the Lease Agreement (Pet. Exh. 1) (R. 292a), provides the usual customary provision to be found in contracts of this nature:

> "Lessor further agrees to keep and maintain said leased vehicles and equipment at all times during the terms of this Agreement in first-class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies and in accordance with all safety rules and regulations promulgated by the Company or by the Insurance Company carrying the insurance risk on Lessor."

The provision that an independent contractor will keep his equipment in good repair is usual, and is in compliance with law.[24] The provision tends toward the achievement of result and nothing else.

In the Court below the Board also contended that the mode of compensation to the owner-operator is little more than an intricate piece-work wage system. Assuming it is so, the piece-work system does not of itself change the relationship. An independent contractor relationship may be es-

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[24] The Motor Carrier Act is now part and parcel of the Interstate Commerce Act. The Petitioner is governed by this Act.

Section 204(a) of the Act creates the duty on the Interstate Commerce Commission:

> "* * * to regulate common carriers by motor vehicles * * * and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * * uniform system of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

In *Commercial Standard Insurance Co.* v. *Robertson*, 159 F. 2d 405, the Court states, the purpose of S. 204(a) (1) is to protect the public upon the highways against hazards of operation by inexperienced, incompetent and unfit persons and against those working in excess of maximum hours with dangerous equipment. To guard against this the Commission was given the responsibility of fixing the qualifications of operators and maximum hours of service. Thus, whether vehicles be carrier owned or leased, the safety standards and requirements for vehicles are and should be identically enforced.

tablished even though the agreement provided for payment on a piece-work plan provided as here all other major attributes of the independent contractor relationship prevail.[25]

The Board's position is untenable.

The Court has erroneously laid undue stress upon the right of control.

Petitioner concedes that the right of control is of importance in determining the employee status, but of itself or by itself it is not the determinative criterion. There is never a complete and absolute divorce of control over an independent contractor. It is only the extent of control and the quantum thereof that is to be measured and weighed.

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[25] In *N. L. R. B.* v. *Steinberg, supra,* the trapper was paid an express amount per skin and only for that which he trapped and at a price which the Company determined, without any right to the trapper in reaching such determination. Surely this is piece work. Yet, it was held the relationship was that of an independent contractor.

In *Hirsch* v. *Rothensies,* 56 F. Supp. 92, p. 97: "On the record in this case I find no such evidence of control over Moccio by plaintiffs in his methods of operation or in the performance of his work that would lead to a conclusion that a master-servant relationship existed; on the contrary, the facts fully support plaintiff's contention that Moccio was an independent contractor. Moccio *was paid a flat rate per garment felled. Out of this he paid all the expenses connected with the work he understook to do. He supplied* his own automobile, gas and other incidental expenses; he paid the homeworkers and supplied them with needles and thread. When the results of his work were unsatisfactory; that, is when a garment did not pass *inspection, the loss fell upon him * * * the difference between his expenses and the amount received from the plaintiffs constituted his earnings or more exactly his 'profits'.* It is true Moccio on occasions, told plaintiffs that his home workers wanted more money or that his expenses were higher, and as a consequence, a new rate per garment was agreed upon, but this is not inconsistent with a continuing independent contractor relationship." (Italics ours.)

In *J. Howard Smith, Inc., supra,* the Board held a captain of the boat under contract with Smith, who agreed to sell fish to Smith at a certain price per thousand, an independent contractor.

There is always some reservation of control over the independent contractor by the person who hired or contracted the services of such a person. Such a reservation of control is a guard against the result desired and necessary protection of the obligations of the contract which have been imposed upon such a person.[26]

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[26] *Chicago Rock Island & Pacific R. Co.* v. *Bond, Administrator of Turner* (*supra*). On page 455, the Court stated: "There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for non-performance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetentcy or neglect."

In *Alexander* v. *Frost Lumber Industries,* 88 F. Supp. 516, p. 518, "The test of the degree of control forming the relationship of independent contractor and owner is described in *Merritt* v. *E. L. Bruce Co., supra,* as follows: "Plaintiffs' counsel call attention to certain testimony in the record, and argue that it evidences such a control of the operations as to make Jones a mere employee. They refer to portions showing that the operations were suspended by defendant on two different occasions, for a period of five or six days each, because of a resulting excess of logs; that it ordered the ash logs taken to Oak Grove, instead of to Sheldon as originally agreed, and for that change Jones was paid an additional $1.00 per thousand; that if the workmen fail to cut certain trees, such trees were ordered cut by defendants scaler; that 'cull' logs were rejected; and that when the log trucks reach the agreed destinations, an employee of defendant company selected the particular spot for the unloading. As we view it, these are matters of general supervision affecting the results to be accomplished, and do not indicate control of the means and manner of the performance of the contract. In 14 Ruling Case Law, p. 68, we find the rule relating to control of results as distinguished from that of means of the performance to be well stated, as follows: As a practical proposition, every contract for work to be done reserves to the employer a certain

In the reading of any accepted contract arising between an independent contractor and the person who hires him

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degree of control—at least to enable him to see that the contract is performed according to the specifications. The employer may exercise a limited control over the work without rendering the employee a mere servant, for the relation of master and servant is not inferable from the reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative so long as he does it in accordance with the contract."

> "The employer may exercise a limited control over the work without rendering the employee a mere servant, for a relation of master and servant, is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative, so long a she does it in accordance with the contract." 27 AM Jr. Sec. 7, page 488 and cases cited.

Also in *Party Cab Co., supra,* where the Court at page 92 held that:

> "As to the control which plaintiff exercised over the drivers, the Board in its brief states, 'the Taxpayer controls whether a particular individual works, when his working shift begins, how long it may last, when it ends, which taxicabs he is allowed to use, and the fact that only a particular driver may operate a taxicab during the shift in question', and it states further, 'and a much more realistic and effectual control is found in the undisputed fact that violation of the taxpayer's rules or regulations might result in the taxpayer's refusing to allow the offender to take out a taxicab again'.
>
> *The weakness of this argument on control lies in the fact that the elements relied upon by the Board are matters which concern the plaintiff's business rather than the services performed by the drivers. The matter of control which is material is that which the plaintiff exercised over the drivers during the period they were in possession of the cabs rather than what the plaintiff might do either prior or subsequent to such period.*"

In *Casement* v. *Brown, supra,* at p. 622, the Court said "on the subject of control, 'The functions of the engineers were to see that they complied with this contract—only this and nothing more'. They were to see that the thing produced and the result obtained were such as the contract provided for".

See also *Mutual Trucking Co., supra.*

will be found the classical language that the work to be performed by the independent contractor should be in a good workmanlike manner.[27]

It is also respectfully contended by the Petitioner that although the factor of control is of importance in determining the independent contractor status, all of the other factors going to make up such a status must be given equality of emphasis.[26]

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[27] *Anglim* v. *Empire State Mine Co.*, 129 F. Supp. 914, p. 917, "The lesser appear both in theory and practice and have really been independent contractors. In respect of the right of the lessor to request the discharge of objectionable workmen, the court found that, as mutually understood, its retention was for the purpose only of suppressing highgrading and of insuring compliance with safety regulation so essential in underground work. Nor is the agreement of the lessees to perform in a minerlike manner of significance as evidencing an employee relationship. Such a provision, as well as the right of inspection, is almost invariably found in mining leases."

The Court in substance rejected as determinative, certain evidence of the exercise of the right of control to create an employee relationship. On the other hand found that the right to exercise such control over an independent contractor was to secure the performance of a contract. (See *N. L. R. B.* v. *Steinberg*, p. 24, this brief).

[28] In *Tapagar* v. *Birmingham*, 75 F. Supp. 375, p. 388: "That in determining whether under the S. C. A. the relationship between the parties is that of employee or independent contractor, the relationship is to be established for the purposes of the Act by giving equality of empahsis to each factor set forth by the Supreme Court or to any other factor of pertinence in the individual case. In making such determinations, the factor of control is not to be given paramount consideration or to have controlling emphasis placed upon it. That factor is really to be treated and considered as only one of pertinent factors."

Also the entire situation must be given the "over all" view.[29]

The Court below has previously enunciated the principles of law involving this very question and has not impaired or changed the basic and fundamental concepts in defining the independent contractor relationship.[30]

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[29] *Anglim* v. *Empire State Mines Co.*, 129 F. 2d 914, 917; *Rutherford Food Corp.* v. *McCoomb*, 331 U. S. 722, 730; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, page 53. To the same effect "There is no rule of thumb that defines precisely the relationship between Employer and Employee. Degrees of control, risks of loss, opportunity for profit, investment in facilities, permanency of the relation and skill in workmanship. All are important for decision. The entire situation controls the decision. *Fahs* v. *Three Gold Corp.* (C. C. A. 5), 166 F. 8d 40, pages 44-45.

[30] *Venuto* v. *Robinson*, 118 F. 2d 679. This case involved tort liability and on page 681, this Tribunal speaking by Goodrich, C. J., stated:

> "Viewing the evidence in the light most favorable to the plaintiff, the following facts may be found: Robinson had done no hauling except for work received from Ross for a period approximately six months to a year prior to the collision. He had no office, telephone, stationery, bills of lading or freight bills. He had no arrangements or direct contacts with any shippers, but he received sufficient work or business from Ross to keep him busy. There is evidence that the parties called the arrangment between them a lease of the Robinson equipment to Ross. At the time of the collision Robinson was hauling a load of merchandise which had been delivered to Ross by the shipper. The bills of lading were signed by the Ross dispatcher, Herman, in N. Y. * * * The freight bills covering the shipment bore the statement:
>
> 'Received Above Articles for delivery as shown.
>
> C. A. Ross, Agent, Inc.,
> By .....
> Owner' ".

And on page 682 the Court continued:

> "The problem then becomes one of fact matching of various decisions to see whether a set of facts under consideration

(R427)

Opinion p. 4: "Title is to remain in the company during the term of the lease and reserve to the company the option to purchase the tractor at the average 'as is' value upon termination of the agreement for any reason."

An examination of the applicable portion of Article VII in the Lease Agreement will show that it concerns itself entirely with insurance regulations and that only for insurance purposes is title in the tractor to remain in the company's name during the term of the lease (R. 290a-291a).

Portion of Article VII:

> "In order to comply with the insurance regulations of the State of New Jersey, it is necessary that title to tractor listed herein remain in Company's name during the entire term of this agreement."

But even if the language of that clause is taken out of context, that language together with the note given for the balance of the purchase price (R. 295a) and the agreement to pay the cost of recording this indebtedness (R. 300a) would indicate the existence of an ordinary conditional sale with title retained in the seller for the purpose only of securing payment.

The validity or invalidity of the conditional sale agreement is immaterial. As between the parties to the agreement, it is good.

The enterprise at the Raritan Terminal was a new one and the petitioner had the right to chose the manner of its operation. Why it may have chosen to operate on a "lease system" is irrelevant. One of the reasons most frequently assigned to this type of arrangement is that it

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is covered by the adjudicated cases. Obviously, the problem is, in most instances, a matter of judgment for an exact duplication of one piece of litigation by another is never found. But an examination of New Jersey decisions convinces us that, in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the courts have held the relationship between the parties to be that of employer and independent contractor (citing cases)."

cuts the cost of maintaining equipment by shifting to the drivers the burden for keeping his equipment in repair.

There is not a word in this record indicating even in the most remote degree that the sale of the truck to each owner-operator was not open and above board. The strongest proof of the bonafideness of this transaction is the fact that the petitioner retained ownership in the trailer (R. 51a). If there was any intent to have the sale of the tractor one of form only, then why would not the petitioner have practiced the same procedure with the trailer.

The agreement of sale (R. 299a) clearly indicates a transfer of title upon delivery of the tractor to the owner-operator. It seems unnecessary to try to impugn the motives of the parties to the agreement or to laboriously attempt to torture the language of a present sale into something else.

And there is nothing here to indicate that this contract is a sham to cloak real relationship.

The operators knew that they were the owners of their respective tractors. When McCart, an owner-operator, is told that his brother cannot ride on his tractor by Mr. Kenny, Petitioner's safety-man, he answers "this is my truck and I am paying for it". Kenny at no time claimed that it was the Petitioner's car, all he said was that it was registered in the Petitioner's name (R. 263a).

The Board does not consider the element of ownership vital nor disputed the sale of the tractor. Before the Trial Examiner, counsel for the Board stated "It seems to me that the question of ownership here is not too relevant. The question is who supplied the tractor to Salinger. I don't thing there is any doubt that the company did sell it."

In the *Nelson Ricks Creamery Company, supra*—the driver furnished the truck and the company furnished the van. The truck was unsuited for the milk business without the van. In our case the truck may be used for any purpose. *The vans were purchased from the company by each driver under a conditional sales contract. Title to the vans remains in the company,* who purchased them in fleets, *during the entire course of the contract. There is*

no provision in the contracts allowing the driver to secure title by paying the balance due. Further, if any time during the course of the agreement, either party terminates the "Milk Hauler's Contract" upon which the sales agreement is dependent, possession of the van reverts to the company and all payments made by the driver are cancelled as depreciation charges. The Board did not hold that this created company control. What the Board did say with respect to the above is most enlightening. "Even assuming that the agreement is unconventional in some respects, it cannot be doubted that it was designed to meet a definite situation and was willingly entered into by the parties. The fact that the employer may under certain circumstances, exact a forfeiture of the payments made, proves, at best, that the employer has the better "bargain" (note 1, in Board's opinion).

Petitioner started its operation at Raritan expressly under the independent contractor plan and each and every owner-operator had the same agreements.

The proprietary interest of the owner operator is real, genuine and not illusory. The owner operator agreed and did purchase a truck and delivery of the truck to him was assured upon payment of the purchase price. The manner in which the purchase price was to be paid does not negate a bona fide sale. Whether or no there was compliance with the Uniform Sales Act of New Jersey, is immaterial.[31]

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[31] This point was specifically ruled upon in *Magruder* v. *Yellow Cab Co. of D. C., supra,* at p. 325:

> "It is even possible that there has been here a violation of Order No. 1059, Section 6 of the Public Utilities Commission of the District of Columbia; no public vehicle licensed under the provisions of paragraph 31 (D) of the Act of July 1, 1932, shall be operated by another person other than the owner of such vehicle or his duly authorized employee'. But we are told that no move has ever been made to enforce this provision against either Yellow Cab or its drivers. *In any event, these considerations are in no way determinative of the actual relationship between Yellow Cab and its drivers; for the nature of that relationship stems from the contract between the parties.*" (Italics ours.)

Only the terms of the agreement and the conduct of the parties, pursuant to the terms thereof, can determine the relationship of the parties.

Opinion p. 4 makes mention of the option on the part of the Petitioner to purchase the tractor at "as is" value upon termination of the lease agreement (R. 293a), as an indication that Petitioner actually retained title all the time. The "as is" value is determined by appraisal by three competent persons acceptable to the parties (R. 294a).

An option to purchase on the part of the Petitioner presupposes that the owner-operator does have something to sell. That he is the owner of the tractor is obvious if we would assume that he would refuse to honor the option. All the Petitioner would then have would be a cause of action in damages for breach of contract.

The clause is an equitable provision with respect to Petitioner's right to purchase all that which it has leased and is a common business agreement. In *Texas Co.* v. *Higgins,* 118 F. 2d 636, this question is discussed. There under the terms of the agreement, the plaintiff had the right to buy out the equipment of the operator. Nevertheless, the Court upheld the independent contractor relationship denying the contention of the defendant that the right to terminate the relationship and purchase the plant relationship (see clause R. 300a).

Payment of the note (Opinion, p. 4): in what manner an agreement which provides that payment of a note may be postponed creates company control in any instance and particular in the case at bar is very difficult to see. Grace periods in agreements are usual and ordinary. This clause is solely for the benefit of the purchaser owner-operator. It is a grace period granted to the owner-operator with language to prevent a penalty and to provide against default that may arise during periods when Petitioner does not have work or insufficient work for the owner-operator. It is not uncommon that in independent contractor agreements—those who contract with independent contractors will make and do make what might appear to be unusual

concessions to have the work done. A most patent illustration of this very situation *In the Matter of Alaska Salmon Industry*—81 N. L. R. B. 1335—the Board held an independent contractor relationship to have been established where a superintendent whose function it was to engage fisherman to throw in a "cumshaw" or credit, free gasoline, boat repairs or free food for the season. And in this very case—the company occasionally assisted fishermen in the purchase of their boats by permitting them to buy them on the installment plan. And the Board makes this comment on this latter point "In this manner the company attempts to insure that the purchaser will fish for it." The Board held the fisherman irrespective of the credits, free gasoline and other benefits to be independent contractors.

The right to terminate (Opinion p. 4). The right to terminate pursuant to the terms of an agreement which provides that the driver operate in harmony and to the best interests of all persons in the industry does not make Salinger an employee.

In *N.L.R.B.* v. *Steinberg, supra,* the agreement provided that the trapper devote "his best efforts and skill to this pursuit". Analogously this provision is synonymous with our provision "that the driver operate in harmony and to the best interests of all persons in the industry". The Court in the *Steinberg* case did not find such language inconsistent with an independent contractor relationship.

In *re Nelson Ricks Creamery Company, supra,* the agreement provided that the driver operate the route in a "good and businesslike manner" and not to "cause or permit diversion of the company's volume of business" to other persons. The determination of what constitutes a compliance of these provisions apparently rested with the company and failure to comply with the provisions of the contract subjected the driver to a $100 indemnity. It is submitted that the language "good and businesslike manner" is synonymous with the language "in harmony and to the best interests of all persons in the industry" our language.

And the right to terminate on notice in an independent contractor agreement is common place. In *Chicago Rock Island* v. *Bond, etc. supra* we find this statement by this Court—page 455. "He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for non-performance. This was only a prudent precaution indeed, in view of the purpose of the contract, etc." [32]

In *J. Howard Smith Inc., supra,* the contract with Atlantic Navigation Company provided for termination on two days notice upon failure to comply with the terms of the agreement.

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[32] Thus in *Party Cab Co.* v. *United States* (*supra*) the Court on page 93 says:

> "The Board suggests that the plaintiff had the unlimited right to discharge by refusing to allow a driver to take out a cab. This is rather a novel application of the meaning ordinarily attributed to the word 'discharge', the same argument could be made in any case where one person refuses to hire or lease an instrumentality to another, and the fact that it could refuse to renew an agreement with a driver is equally consistent with the status of an independent contractor as it is with the employee relationship".

In *Texas Co.* v. *Higgins,* 118 F. 2d 636, at p. 638, where the defendant argued that the right to terminate the relationship gave the plaintiff absolute power of control. The Court by Judge Learned HAND in denying the validity of this contention said:

> "We cannot agree. The character of the relationship was determined by the rights and obligations assumed, and it is no answer that the plaintiff could force a change in these by threatening to terminate the agency. Assuming that Thomas would inevitablly have complied with the invasion of his right, secured by the contract—which is by no means certain and would obviously depend upon how burdensome these were—legally, the effect would be to force upon him pro tanto a new agreement. *The plaintiff's power to end the agency was merely a power to free itself from all obligations; it was not a legal power to compel Thomas to assent to new proposals, and it might, or might not, be effective for that purpose.*" (Italics ours.)

In the *Greyvan* case, *supra,* the contract was terminable at any time by either party and as has already been stated. It should be observed that although in the four (4) cases above mentioned, to wit: *N. L. R. B.* v. *Steinberg; in re Nelson Ricks Creamery Company; in re J. Howard Smith* and in our case, there is only a variance in the language employed. The intention is the same. The right to terminate has never been held by the Courts or the Board to be such a reservation of control to change an independent contractor relationship to one of employer-employee and has been considered by the Courts as a means for preserving the contractual covenants and the fulfillment of an agreement.

The reason for the provision allowing for termination is obvious. How else under the contract with Salinger and the other owner-operators could the petitioner secure for itself compliance with the terms of the contract and that Salinger will perform the job to be done in the most effective manner possible. If Salinger were thought to be an employee, then it must be conceded that the Petitioner would not have needed that particular form of insurance and security. The right of an employer to discharge an employee at any time is an accepted fact. The right of an employee to terminate his employment is likewise an accepted fact and such a right, that is, the right to terminate by either party does not create an employer-employee relationship.

The Court in the Opinion p. 5 says: (R 428)

> "The fact of ownership of tools or equipment is helpful in deciding whether one is an independent contractor."

Then the Court below challenges this important criterion this way and states (Opinion p. 5). (R 428)

> (a) "If the driver 'owns' the truck his ownership is qualified in ways not usual for owners. He gets no right to possession of the tractor. * * *

(b) "But if the owner, as part of the agreement to perform service, surrenders complete domination over the instrumentality and the right to decide how it shall be used, as here, then the fact of ownership loses its significance". (R 428)

Salinger and every other owner-operator received immediate possession of his tractor and pursuant to the agreement upon payment of the purchase price the owner-operator was entitled to the tractor as his own. We should not confuse possession with title which only for the purpose of insurance and only during the term of the agreement remained in Petitioner's name.

The Court also challenges the ownership of Salinger by the reference in the Opinion that where an owner as part of the agreement to perform service surrenders complete dominion over the instrumentality and the right to decide how it shall be used the fact of ownership loses its significance.

Salinger was boss of his own destiny. He did not surrender any dominion over the tractor. Pursuant to the terms of the contract he could employ others to do the work provided therefor. When on the road the tractor certainly was under his sole control and direction. Obviously once again the Court finds another attribute of the independent-contractor relationship vested in Salinger but seeks to destroy it by an attempt to cast doubt on the sale.

It may be well to again point out that the Board did not contest that the Petitioner sold the tractor to Salinger.

Road Purchases—Article VII of the Lease Agreement states as follows: (R 293a)

"It is understood that all 'road' purchase will be charged against the Company and that Buyer will surrender invoices for same immediately to Company's office for deduction from Buyer's equipment rental compensation. The withholding of such invoices by Buyer shall be sufficient grounds for com-

pany to request termination of this agreement. It is understood that 'road' purchases *shall not include* accessories unless specific prior approval has been obtained from Company."

This provision is for the convenience of the owner-operator. If the operator, while on the road, desired to make any purchase for his truck and did not have the necessary funds to pay therefor, such inability would prevent his performance of the agreement. The Petitioner permitted purchases to its account, to enable the owner-operator to make such purchases or repairs in case of a breakdown as may be necessary, while owner-operator was away from home and without the necessary funds to pay therefor. Certainly this convenience cannot spell out any type of supervision or control over the manner and means of the work to be done. Owner-operator was under no obligation to make any purchases and the owner-operator still was privileged to pay by cash.

Nor does the right to charge gas or oil to the Petitioner create that degree of control to make Salinger an employee. The fact is that the provision of the contract afforded both the independent contractor and petitioner a greater facility to comply with the terms of the contract, and thus accomplish the result.

The owner-operator had to pay all operating expenses. Under paragraph VIII of the Lease Agreement the owner-operator had to pay for the maintenance, repairs and other up-keep of their tractors.

That the tractors would be serviced at the Petitioner's garage was a distinct advantage to the owner-operators. They could do it on credit. Moreover, there was no loss of time as there would be in having them serviced elsewhere.

No stronger criterion to support the independent contractor relationship can exist than the obligation of Salinger to pay all expense to carry on his operation. No employee undertakes to pay expenditures such as is here contracted

for. In each case where the owner-operator pays the operating expense, the independent contractor relationship has been held to be established. See *Greyvan* v. *Harrison supra; U. S.* v. *Mutual Trucking Co. Inc. supra; Party Cab Company, supra; in re Nelson Ricks Creamery Company Inc. supra; Magruder* v. *Yellow Cab; N. L. R. B.* v. *Steinberg, supra.*

The owner-operator was responsible for any damage done to the cars hauled. The owner-operator was responsible for any damage reported by dealers on the cars delivered by him and was required to pay for such damage (R. 185a, 201a). To protect himself in the event that the cars were found by him to be damaged prior to loading, he had to report this damage to the dispatcher or file with him an exception report prior to loading them on the trailer (R. 51a). When does an employee pay for damages to goods delivered by him? Such damages, as in our case, may run to a considerable amount. For an employee to undertake to be responsible for such damages is inconceivable. But isn't that the usual situation where goods are transported by independent contractors?

See:

Greyvan v. *Harrison, supra;*
Mutual Trucking Co., supra, etc.

At (p. 3 Opinion) a reference is made to the union contract. The union contract in effect between Petitioner and local A.F.L. Teamsters' Union is not inconsistent with the independent contractor relationship. In *Harrison* v. *Greyvan Lines, Inc. supra,* a union contract was likewise in force and the Court did not find therefrom that the independent contractor relationship had been changed to employee.

Insurance (Opinion p. 5). This expense is an operational cost borne by the owner-operator. In the *Greyvan* case, *supra, t*he contract provided therefor not unlike the provision in the case at bar.

D.

The decision that James Leslie Salinger is not an independent contractor is contrary to the law as enunciated by this Court, and in conflict with decisions of other Circuits on similar facts.

The Court below concedes that the facts in the *Greyvan* and *Mutual Trucking* cases are similar to those here but the Court in so doing says (p. 7 Opinion): (R. 430)

> "In the Greyvan case there was no such express reservation of control over the details of the work of hauling furniture, nor the actual exercise of control, as here. *In addition the owner-operators there owned their own trucks and all equipment before they came to work for the company, and the work itself required the regular use of helpers who were hired, paid, directed and discharged by the owner-operator.* These were the principal factors mentioned by the Supreme Court to accompany its statements that, 'these driver-owners are small businessmen.' 321 U. S. at 719. All are absent in the case at bar. *Similarly, although it is perhaps a closer case, in the Mutual Trucking case it appears that the owner-operators were actually the owners of their tractors and trailers before they contracted with the company, retained almost complete dominion over them and they hired, paid and discharged their own drivers*" (italics ours).

What facts in the evidence express reservation of control in the case at bar over the details of the work or the actual exercise of control, more than in the *Greyvan* case? The manner in which Salinger and the other owner-operators performed under the contract is simple. New cars were on Petitioner's lot. The owner-operators loaded cars on trailers without any assistance or help of any of the personnel of petitioner and made delivery of these cars to designated points furnished by Petitioner. In so doing, the tractor and trailer was under the complete control and dominion of Salinger or any other owner-

operator. Once loaded the owner-operator left, not to be seen until he returned and wanted another load of cars. There was no direction as to how long the trip should take or what route Salinger or the owner-operator was to choose to such points of destination. Salinger and every other owner-operator had the sole direction and control of the manner in which everything and anything from loading, unloading, driving, etc. was to be done. In addition Salinger and all other owner-operators asumed complete responsibility for the carriage of the cars from the time they loaded right up to delivery and any damage which would be sustained by reason of improper loading, carriage or improper delivery was that of Salinger's and every other owner-operator unless Salinger reported the same before loading. Salinger and every other owner-operator assumed every risk attendant with the operation; he had to pay all operating expense even to the extent if any unforeseen damage occurred; and certainly when Salinger was on the road and he was for numbers of days at a time, it was he who determined what he should do, the manner and means to do it, and when he should do it, without any supervision or control by any of the personnel of the Petitioner. He was not obliged to report to anyone, anytime, anywhere. Salinger could engage a helper or another driver to do his work, he had the right so to do if he did not desire to work, he was not obliged so to do. Under these circumstances in what respect has the Petitioner reserved control over the details of the work or actually exercised control in any manner different than the reservation or exercise of control as shown in the *Greyvan* and *Mutual Trucking Co.* cases?

The Court below lays great emphasis on two factors which it claims are lacking in the case at bar to warrant a finding that Salinger was an independent contractor and

which differentiates this case from the *Greyvan* and *Mutual Trucking Company* cases. These factors are:

(a) The owner-operator owned their trucks and all equipment before they came to work for the company, and (b) the work itself required the regular use of helpers who were hired, paid, directed and discharged by the owner-operator.

Petitioner respectfully urges that the lower Court's criteria is contrary to all previous pronouncements of law to determine the independent contractor relationship and is in conflict with existing decisions.

In view of this opinion by the Circuit Court, it becomes of paramount importance that this Court determine:

(1) Is it necessary in the establishment of an independent contractor relationship that the independent contractor must own the instrumentality or the means of performing?;

(2) Is it necessary in the establishment of an independent contractor relationship that the independent contractor own the instrumentality before he becomes engaged?;

(3) Is it sufficient in the establishment of an independent contractor relationship that the independent contractor have a beneficial interest in his equipment?;

(4) To create the independent contractor relationship; must the work to be done require the regular use of helpers?;

(5) Shall every individual who performs the nature of his engagement without helpers, be deemed an employee?

(6) Is one who engages to do a piece of work and hires helpers, to be deemed an independent contractor, even though he does not own the tools or equipment and has no interest therein to do the work?

It is submitted that it is not necessary as a condition precedent for the establishment of the independent con-

tractor relationship that the independent contractor own the instrumentality or the means of performing his work prior to or subsequent to the time he becomes engaged. As a matter of law the relationship should be established if the independent contractor does not own the equipment and it should be sufficient that he merely have a beneficial interest therein. This is the Law.

In the *Party Cab Company* case, *supra,* the taxicabs were operated by drivers engaged by the company under an oral agreement between the company and the drivers. Under the agreement which exists from day to day, a driver was assigned a particular taxicab to drive during a single day or night shift, which shift began and ended at the time determined and fixed by the company. The drivers paid to the company a specified sum for the use of the taxicab. They had no investment. These drivers were not owners, not even conditional vendees, at best they may be lessees or bailees and the Court held these drivers independent contractors.

In *Magruder* v. *Yellow Cab, supra,* the company leased and let the taxicabs to drivers for a specified sum per day or per week. The only interest which the driver had existed by reason of the daily or weekly letting. There was no investment and the Court held the driver to be an independent contractor.

> "The drivers acquire from Yellow Cab the possession and beneficial use of the taxi cabs."

In the Matter of Alaska Salmon Industry, supra, the fishermen who were engaged to do the fishing were afforded the opportunity to purchase the boats on the installment plan and the only interest such fisherman had was by reason of such purchase. These fishermen were held to be independent contractors.

In the *Nelson Ricks Creamery* case ,*supra,* the driver furnished the truck, which truck was unsuited for the business of the company unless it was equipped with a covered van.

The vans were purchased by the company and by agreement, sold to drivers. Title to the vans remained with the employer during the entire course of the contract. There was no provision in the contracts allowing the driver to secure title by paying the balance due. Further, if at any time during the course of the agreement either party terminates the milk hauler's contract upon which the sales agreement is dependent, possession of the van reverts to the employer and all payments made by the driver are cancelled as depreciation charges. The Board held the driver an independent contractor.

In *J. Howard Smith, Inc., supra,* the skipper of the boat had no interest whatsoever in the ship with which he undertook to perform the contract except the right given him by the contract—full possession, management, navigation, control and operation of the vessel and at best this right was but for an express limited time—the fishing season—and then it could be terminated upon two days notice. The Board held the skipper an independent contractor.

A criterion which the courts at times do employ as some indication of the independent contractor relationship, is not that the independent contractor must be an owner, have title or be a conditional vendee, but rather that such person have a substantial investment in the facilities used in performing services for another. But as the Court well says in defining the words substantial investment in *re Tapager* at page 387:

> "Such investment is frequently represented by ownership of or an *interest* in an establishment or in equipment." (Italics ours.)

Obviously such interest may take on various forms. Substantial investment is not intended to mean more than "an interest".[33]

In the case at bar, the owner-operator did have an investment; a substantial beneficial interest in the equipment they were using to perform the contract and with each further payment made on such equipment the investment became more substantial. The down payment on a truck was 10% of the cost. In addition to which the owner-operator signed a promissory note for the balance. Such promissory note was the owner-operator's personal obligation. This investment is more than adequate to meet the criterion of investment.

Would it be said that where a veteran allowed by law to purchase a house with no money or little investment but executed a mortgage for the consideration and he used such property for his business, that he had no investment?

There are instances too numerous to recite where the independent contractor must hire and lease equipment either for the reason that the cost thereof is prohibitative to himself as a small businessman or that in his efforts as a small businessman he purchases the equipment on time.

Shall we penalize the Petitioner because it had the ability to get the trucks and afford the owner-operators like Salinger the opportunity to purchase them, irrespective

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[33] In the *Party Cab* case, supra, the Court destroys any argument or contention of capital investment, at p. 93 the Court says:

> "The Board argues that the drivers are not independent contractors, and, therefore, they must be employees. It is pointed out that the drivers have no capital investment, no business telephone, no regular place of business and do not advertise. And we suppose it is true, as asserted by the Board, that 'the drivers go out of business' at the pleasure of the taxpayer, in which event they are in effect 'out of a job like any wage earner.' It is hardly accurate, however, to say that the drivers have no capital investment, when they furnish the oil and gas and the labor by which they earn a livelihood."

of the terms of such purchase? Would the Court below have arrived at a different conclusion if Salinger had a sales agreement with someone else other than the Petitioner, or if Salinger had borrowed or leased such equipment from someone else other than the Petitioner?

The Court below in a note indicated that the Sale and Lease Agreement are mutually dependant and interrelated. So too in re: *J. Howard Smith, Inc., supra* and *Nelson Ricks Creamery Co. Inc.*

In the *Magruder* case, *supra,* the owner of the taxicab was the Yellow Cab Company, and the drivers were merely permitted to operate them.

The distinction which the Court draws between the *Greyvan* case and the case at bar is not alone that in the *Greyvan* case, the owner-operator owned their trucks and all equipment but that they owned the trucks and equipment before they came to work for the company. Such a holding would mean that the owner-operator could not simultaneously with the engagement as an owner- operator or subsequent thereto buy his equipment or tools.

It is common knowledge that in the course of any job or piece of work an independent contractor may find the necessity for other tools or equipment, or it may well be that at the time such independent contractor engages to do his certain piece of work, he does not have possession of the very equipment necessary and intends to purchase it to complete the job he contracted to do.

In the *Nelson Ricks Creamery Co. Inc., supra,* the company sold the trailer.

In the *Alaska Salmon Industries, supra,* the company sold the boat.

In the *J. Howard Smith Inc.* matter, the Smith Company, through its wholly owned subsidiary, Atlantic Navigation Company, furnished the boat to the captains who were to do the fishing.

It is respectfully submitted that the Court erred in finding Salinger to be an employee based upon the errone-

ous legal conclusion that he was not the owner of his truck and equipment before he came to work for the company.

The second distinction which the Court emphasizes is that in the *Greyvan* and *Mutual Trucking Co.* cases the work itself required the regular use of helpers who were hired, paid, directed and discharged by the owner-operator.

In our case the Court below comments it was a "one man job". Excluding for the moment the professions such as law, medicine, dentristy, engineering or others similarly situated, but directing attention to plumbers, carpenters, electricians and many allied mechanical trades, it is well known that all these persons are in business for themselves as independent contractors, and they operate as individuals without helpers. Thousands upon thousands of these persons engaged in mechanical trades work alone.[34] Their work does not require the regular use of helpers.

The law does not recognize that to establish an independent contractor relationship, the work must require the regular use of helpers.

As Mr. Gearhard said (see p. 7 of this Brief).

In *N.L.R.B.* v. *Steinberg supra,* the trappers did the work alone. Work did not require the use of helpers. The Court held the trappers to be independent contractors.

In the *Party Cab* and *Magruder* cases, *supra,* the drivers did the work alone and the work did not require the use of helpers.

In *Nelson Ricks Creamery Co. supra,* the drivers of the milk truck did not require the use of helpers.

We do not believe that this Court in the *Greyvan* case stated as a matter of law that an independent contractor

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[34] If this Congress had not interfered tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment that they were covered by social security, are subject to payroll taxes, would have found that they had been subject to the social security system by Bureaucratic ukase."

See also, Interstate Commerce Commission report issued June 5, 1947 and referred to on page "17" of this brief, also the comment in Business Week, on the same page.

must own his truck and equipment before he came to work for the company to the extent that a bona fide independent contractor relationship would be destroyed if the contractor did not own his equipment prior to the engagement of the work.

Measured by the most liberal test of the law of master and servant and the most severe interpretation one may apply to the Congressional mandate, it must be found that Salinger was not an employee but was an independent contractor. The Court below expended much effort seeking legal rationale for the strained holding that Salinger was not an independent contractor, but the evidence as disclosed by the intention, conduct of the parties and the practices of the owner-operators under the agreements must lead to the conclusion that Salinger was an independent contractor. The reasons are as follows:

(a) Salinger was a small business man. Salinger was the owner of a truck and Salinger had a substantial investment and a beneficial interest in such truck.

(b) Salinger did not receive wages. The income of Salinger resulted from his individual effort, capable management, his ingenuity in good business and was the profit remaining after all of the expenditures necessary or incidental were paid by him in connection with his operation.

(c) Salinger was subjected to the risk of loss. The basis for this whole proceeding and the alleged unfair labor practices are discussions had by Salinger with others that the continuation of the lease system may result in a loss to the owner-operators if the tractors owned by them went bad.

(d) Salinger had exclusive control and dominion over the work to be done by him pursuant to the terms of the contract.

(e) Salinger had the right to work when he willed; he had the right to hire helpers and who such helpers may be and pay such price as he and such helpers agreed to.

(f) Petitioner could not say who such helper should be or the price to be paid to him.

(g) Salinger was not an employee because he had no seniority rights; he had no vacations, pensions or holidays. Salinger's contract required him to do that which his contract provided and he could not be directed by the petitioner to engage in any other work.

(h) Salinger could not be discharged at the will of the employer but his contract had to be terminated after notice.

(i) Salinger was not an employee because he had no seniority rights; he had no vacations, pensions or holidays.

(j) The conduct of Salinger prior to the execution of the sale and lease agreements and the negotiations had with respect thereto makes Salinger an independent contractor.

The conduct of Salinger prior to the execution of the Sale and Lease Agreement and the negotiations had with respect thereto makes Salinger an independent contractor.

It is respectfully submitted in view of the conflicting determinations in the various Circuits and in the Board this Court should express essential criteria necessary to establish an independent contractor relationship to the end that those seeking to engage in independent contractor relationships shall not have foisted upon them obligations and responsibilities never expected or contemplated.

POINT II

Petitioner is not guilty of any unfair labor practices.

A

The Alleged Statement of Petitioner Representatives Do Not Constitute Unfair Labor Practices.

It is respectfully urged that any discussion on this matter is in fact unnecessary because the relationship between the owner-operators and Petitioner was that of independent contractor.

Basically the charge of unfair labor and discriminatory practices finds root in an Employer seeking to discourage unionism. In the case *sub judice,* this is not so.

General Counsel introduced as his exhibit the union agreement made with Petitioner and Local 469 of the International Brothorhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L. (R. 284a). In Article I of this contract the union undertakes to be the bargaining agent for all "owner-operators and driveaway chauffeurs". Under the constitution of the union, the union had the right to represent owner-operators (R. 303a). Attention must be invited that language used in Article II, Section 1 of the union agreement dealing with union security states that those only having union cards "are *to be employed* as *driveaway chauffeurs*" as distinguished from the language used in Article II, Section 2 where it says "that those with paid up cards are to be *contracted* with the company with respect to the *owner-operator system.*" This distinction is important. That portion dealing with driveaway chauffeurs has no application to Petitioner. Petitioner never had any. The Union was within its power in making such agreement, but it was dealing on behalf of "owners" as distinguished from employees.

That Petitioner desired a continuation of the owner-operator plan is unquestioned. But is discouragement from terminating an independent contractor relationship such conduct *as* to be classified as an unfair labor practice? Under what provision of the Act and by what reasoning can this be held?

Assuming *arguendo,* the statements alleged to be made by Hopkins were made, then at best the situation is one where independent contractors are asked not to terminate an existing relationship and change it into something else. It must be noted that at this point of discussion, there is no employer-employee relationship in existence. At this time all that exists is an independent contractor relationship with contemplation of some speculative relationship that may arise sometime in the future, if at all. The statements made to forestall termination of a present commercial business relationship and to forestall the creation of an employer-employee relationship in the *future,* cannot be held to be such *present* discouragement and discrimination as to be considered an unfair labor practice under the Act. The Act specifically controls statements or actions *committed* while an employee-employer relationship *exists or existed.* It does not contemplate jurisdiction over statements made to one who is not *presently an employee* on the speculative possibility that the person may become an employee at sometime in the future. (Sec. 8 (a), (1), (3) N.L.R.A.).

At the most the activities of the owner-operators in acting together and discussing whether or not to change their existing relationship is perfectly in keeping with their status as independent contractors. These men met in the usual manner of businessmen discussing their contractual relationship. They did not speak of wages or working conditions, nor of anything other than the lease contracts under which they were operated. By their own testimony, all they discussed was the lease arrangements and how the contract was working out (R. 82a, 105a, 137a, 153a, 157a, 176a).

But even if an employer-employee relationship be deemed to have existed at the time unfair labor practice implies such conduct on the part of the employer as tends to and restrains employees in a freedom of choice. On the other hand, an employer has a right in the exercise of free speech to present his side of a controversial issue. In *N.L.R.B.* v. *American Tube Bending Co.* (C. A. 2), 134 F. 2d 993 at page 995, Judge Learned Hand said:

> "The respondent professed itself willing to abide loyally by the results of the election, but did not conceal, though perhaps it made some effort to disguise, its preference for no union whatever. But there was no intimation of reprisal against those who thought otherwise; quite the opposite. The most that can be gathered from them was an argument, temperate in form, that a union would be against the employee's interests as well as the employer's, and that the continued prosperity of the company depended on going on as they had been."

There appears nothing illegal on the part of Hopkins expressing himself, assuming such statements occurred, which is denied. Certainly any statement so made comes directly within the scope of freedom of speech intendment. In the leading case of *N.L.R.B.* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, the Court discussed the question of remarks of certain officials and at page 567 held:

> "The Board contends that Respondent is responsible for remarks of certain of its minor supervisory officers which are claimed to indicate hostility on the part of the respondent toward the union * * * The question of law is presented whether respondent should be bound by the chance remarks of subordinates in view of its pronounced policies. It has no history of labor troubles nor union hostility * * * When, as here, an employer has clearly defined its attitude of non-interference, the expressions of minor supervisory employees to the contrary must be regarded as their individual views they speak without authority from their employer. *N.L.R.B.* v.

Clinton Woolen Mfg. Co., 6 Cir., 141 F. 2d, 753; *Utah Copper Co.* v. *N.L.R.B.*, 10 Cir., 139 F. 2d 788."

In the instant case, the Petitioner's record is absolutely clear of labor union hostility, and in addition thereto, has publicly demonstrated its willingness to cooperate in all respects with the desires of the owner-operators. This is concretely demonstrated by the fact that the Petitioner actually entered into a contract arrangement with the union which has been selected by these owner-operators as their representative to negotiate for them, as an independent group, the terms and arrangements of the work which they were to perform with their personal equipment.

The most careful reading of the record cannot disclose a work by any one of Petitioner's personnel derogatory to the association or discouraging any organization or otherwise. If any statements were made, they were made in connection with the lease operation. There is no word in the record asserting that the owner-operators could not do anything they desired with respect to their association with the Petitioner or is there any proof of coercion which barred the owner-operators from a free choice of action.

POINT III

The order of the Board is impossible of compliance.

The Board has ordered that the Petitioner offer to Salinger:

> "Immediate and full reinstatement to his former position or to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination of the Respondent against him by payment to him of a sum of money equal to that which

> he normally would have earned from the Respondent from the date of the Respondent's discrimination agaisnt him to the date of the offer of reinstatement, less his net earnings during the period."

This order by the Board raises a serious question with respect to restoring Salinger to his former status. What shall that be and by what yardstick can we meausre such a status?

In *N. L. R. B.* v. *Carlisle Lumber Co.* (C. A. 9) 99 F. 2d 533, at page 539, the Court stated:

> "The words 'substantially equivalent' cover many things, including rate of pay, hours, working conditions, location of work, kind of work, and seniority rights, if any."

No seniority rights existed here, nor was there a regular rate of pay, hours or working conditions of any kind.

Salinger did not receive any specific weekly or other periodic salary or wage. Consequently, can there be a back-pay order, and if so, what shall be the basis of computation and what monetary yardstick shall be used? Salinger worked when he wanted to; came in when he wanted to or stayed home if he so desired. He was completely independent as to what income from the leasing of his equipment he desired to obtain. This income was measured in turn by the deduction of certain expenses and maintenance costs, which he incurred for his individual equipment. What yardstick shall be used in determining the amount of maintenance and repairs or other expenses which Salinger as independent operator of his equipment may have incurred?

It must be emphasized that under the terms of the contract, the Petitioner is not required to furnish Salinger with any work. And either party may terminate their arrangement by notice.

In *United States* v. *Mutual Trucking Company* (*supra*), the Court on page 660 says:

> "As was presuasively said in an analagous decision of the Supreme Court of Ohio 'the undisputed facts in this case show the impossibility of determining premiums based upon a pay roll when there is none, and there can be none in such a situation'. Coriello v. Industrial Commission, 129 Ohio 589; 196 N. E. 663."

Does the Board act as broker in the purchase and sale of a truck between the Petitioner and Salinger? What shall the terms of this purchase and sale be? The Board is placed in the position of negotiating commercial contracts setting forth terms and provisions thereof between litigants. The Board has no such power under the Act.

It appears in effect that the Board is to act not only as broker to effect the sale and consummation of a cemmercial agreement for the purchase of a truck but also as accountant to prognosticate depreciation, employee's salaries to be paid by Salinger, damages, maintenance and operation costs to be incurred, days when Salinger may or may not have absented himself from working which he had a complete right to do under the contract and the other complicated factors which surround independent commercial business dealings, and finally to arrive at a fair and equitable sum of money which would be fair both to Salinger and the Petitioner. This, it is respectfully submitted is not the function of the Board.

As the different ramifications of seeking to enforce the Board Order becomes clear, a vital question arises which goes to the constitutionality of the action. If the Board attempts to force the Petitioner and Salinger to enter into a contract and agreement of a commercial nature for the purchase and sale of a truck and if the Board seeks to compel the Petitioner to refund certain sums of money as determined by some yardstick which the Board has not indicated, then it is believed that the Board will be exceeding the powers granted to it and the constitutional rights of the Petitioner will be seriously impaired.

In view of the fact that under the agreement either party may terminate by notice within ten (10) days (R. 294a) and the Petitioner may terminate sooner if it desires, does it not appear that any remedy of reinstatement under such terms would be an empty gesture? It is well settled that the Courts will not enforce a vain decree.

It is quite clear that this relationship cannot be fitted into the mould of an employee-employer relationship. A situation which calls for the negation of written agreements, the denial of the expressed intentions of the parties and the disclosed conduct of the parties pursuant to the terms of the agreements, the practical impossibility of any back-pay order with any degree of coherence, the impossibility of reinstatement to a former position, which calls for the compulsory negotiation of a commercial contract for the purchase and sale of commercial goods, the serious constitutional question involving the freedom of contract and the infringement of Petitioner's constitutional rights, all of these negate the existence of an employee-employer relationship and strongly point to the fact that some other relationship exists and that other relationship is that of an independent contractor.

CONCLUSION

It is respectfully submitted the writ should be granted.

Dated, New York, December 12, 1951.

Respectfully submitted,

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Attorney for Petitioner.